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THE AMERICAN JUDICIARY AND RACIAL DESEGREGATION

I

THE history of the negro in the United States can be read as a study in opposing tensions. The fundamental premise of American political philosophy—that all men are created equal in their unalienable right to pursue happiness—is strained by the social inheritance of centuries of slavery. The theory of a limited central government is strained by the intolerable fact of local oppression. The nation's conscience is torn by the stresses persisting from a lamentable institution. To the federal judiciary has fallen the duty of adjusting these opposed pulls, so far as adjustment is within the competence of any governmental organ. Some scrutiny of this judicial task is here proposed.

When the American Union accepted its Constitution in 1789, the reluctant states yielded to the newly created and rather remote central government only those functions necessary for the conduct of warlike or peaceful foreign relations, and those necessary for control of whatever economic processes had a national rather than a local character.[1] Eighty years were to pass, ending with a bitter

[1] The simplicity of primary objectives can be overlooked amid the multitude of specific provisions in the Constitution. There are, of course, many clauses setting up the governmental mechanism by which these substantive federal duties are to be carried out—such as the provisions of Article I for the composition, election and operation of the national legislature and the provisions of Articles II and III for the institutions of the presidency and the judiciary. The federal government was granted the taxing powers essential to its functioning. The exercise of the delegated federal powers was limited by various restrictions—for example, the limitations on federal taxation in Article I, s. 9, clauses 4 and 5. But the ends for which all this was set up appear in the numerous provisions of Article I, ss. 8, 9 and 10, concerning military and diplomatic matters, interstate and foreign commerce, coinage, bankruptcy, etc., and in such grants of executive power in Article II as concern military command and the conduct of foreign relations. The nation was no longer to suffer in war from divided authority; nor in its internal affairs to be powerless to cope with those economic jealousies which had endangered its first years.

civil war, before the government of the Union was charged with protection of the people against injustice at the hands of their own states [2]—injustice described as denial of equal protection, and of due process, of the law.

A sweeping generalisation, conventionally repeated in most discussions of American constitutional theory, assures exclusively to the states all residual powers not so delegated. This bulk reservation, put in words by one of the first ten amendments, adopted almost at the same time as the adoption of the Constitution itself, turns out to mean only that something was left over for the states, but it fails to say what.[3] There remains a latent question whether the reservation reserves anything substantial. The federal government had been given all legislative competence "necessary and proper" for carrying out the enumerated functions [4]—a charter of indeterminate breadth. What are its limits, desirable or actual? The national judiciary explores, one after another, the frontiers of federal power; and the central government occupies these new territories one by one, pushed inexorably forward by economic, social and political forces. Is the United States rapidly turning into a unitary nation, retaining only out of sentimentality the word-usages of its federal origin?

In 1939, commenting on what he considered the decline of federalism, Professor Harold Laski wrote:

> "No one can travel the length and breadth of the United States without the conviction of its inexpugnable variety. East and West, South and North, its regions are real and different, and each has its problems, real and different too. The temptation is profound to insist that here, if ever, is the classic place for a federal experiment . . .
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> "This kind of argument is familiar in a hundred forms. I believe that, more than any other philosophic pattern, it is responsible for the malaise of American democracy. My plea here is for the recognition that the federal form of state is unsuitable to the stage of economic and social development that America has reached." [5]

Professor Laski was here thinking of economic matters, as he shows by a reference later in the same article to what he called "giant capitalism" which, he thought, required the counterpoise of unitary national government. Even in 1939 he was writing after the event. There had already been in progress for two years, by judicial reconstruction of the Constitution, a drastic centralisation of the commerce power in the government of the United States, enabling it, if the Congress should so desire, to regulate all phases of the nation's

[2] By the Thirteenth, Fourteenth and Fifteenth Amendments.

[3] The Tenth Amendment, of 1791, reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

[4] Art. I, s. 8, last clause.

[5] "The Obsolescence of Federalism," *New Republic*, May 3, 1939.

economy, to by-pass the governments of the several states of the Union, and to apply directly to individuals and to private corporations whatever sanctions the Congress thought necessary. In 1937, the Supreme Court had decided that labour relations in a steel mill were subject to federal legislation.[6] By 1942 that court had gone on to hold that a farmer, growing wheat in excess of a federal quota, was subject to a federal penalty even if his wheat was to be consumed on the farm where he grew it.[7] Quarrying stone intended for road, railroad and airport construction,[8] the conduct of an automobile agency,[9] vertical transportation in a passenger elevator,[10] all have now been held within the federal competence.

Economic processes which, though not themselves interstate commerce, still affect it are within the discretion of the federal Congress.[11] The federal power to tax contains latent powers of control.[12] Furthermore, what the commerce and tax powers leave untouched the war power reaches. Federal regulation of rentals of real property gave a notable example in 1948.[13] The extension of federal constitutional power over the nation's whole economy, for which Mr. Laski argued in 1939, has occurred without amendment of the text of the federal Constitution. Judicial construction has brought about this revolution in operation and in doctrine.

Today wholly different problems perplex the United States. A judgment handed down by the nation's highest court proclaims that in the field of public education there is no longer a place for the doctrine of "separate but equal."[14] And still newspapers show photographs of crowds barring negro pupils from public schools; some state officers proclaim a policy of passive resistance; legislatures of some states pass statutes intended to prevent the effectuation of the Supreme Court's order. The stranger may ask the reason for comparative federal passivity in matters affecting millions of school-children in contrast to detailed federal intervention in matters of labour relations and the sale of goods.[15] One might ask why, if the courts have by construction of the commerce clause achieved federal control of local economic processes within

6 *N.L.R.B.* v. *Jones and Laughlin Steel Corp.*, 301 U.S. 1 (1937).
7 *Wickard* v. *Filburn*, 317 U.S. 111 (1942).
8 *Thomas* v. *Hempt Bros.*, 345 U.S. 19 (1953).
9 *Howell Chevrolet Co.* v. *N.L.R.B.*, 346 U.S. 482 (1953).
10 *Borden Co.* v. *Borella*, 325 U.S. 679 (1945).
11 *The Shreveport Case*, 234 U.S. 342 (1914).
12 *Sonzinsky* v. *U.S.*, 300 U.S. 506 (1937).
13 *Woods* v. *Miller Co.*, 333 U.S. 138 (1948).
14 *Brown* v. *Board of Education*, 347 U.S. 483 (1954); *Bolling* v. *Sharpe*, 347 U.S. 497 (1954).
15 This rhetorical question is not intended to suggest that the national administration is indifferent to the question. On the day after the Supreme Court decisions of May 17, 1954, the President urged the Commissioners of the District of Columbia to make Washington a model for the rest of the country in school desegregation. The President has expressed his intention to do whatever is necessary and proper to carry out the Supreme Court's decision; but has made clear his understanding of the complexities involved. See R. J. Donovan, *Eisenhower, the Inside Story*, 162, 391 (1956).

the states, they may not similarly find a means to grant federal control over local education. Is there as widespread a demand for central reform of schooling as there was in 1936 for central economic controls? If the demand of the 1930 liberals for more central power in economic matters, reflected in the Laski essay, has now been fully granted, does this foretell a related and comparable extension of federal authority into the segregated schools of the South. And, if so, by what judicial logic?

II

The federal structure of the United States, like all human institutions, has changed with time. For a century and a half before 1775 the central government of the English colonies in America was somewhat loosely managed from London, an ocean away. Until 1789 no central government of any sort became really effective. Even at the time of adoption of the Constitution the federal government was thought of as an unwelcome necessity, to be distrusted and watched lest it grow too powerful. The Constitution was ratified by the states only on the strength of assurances that a Bill of Rights would at once be put forward to cut down the capability of the central government, lest it invade the liberties of the people and the powers of the states.[16]

Constitutional history of the next century and a half tells of steady growth of federal power, interrupted from time to time by state outcry. Ultimately the battles of 1861–1865 demonstrated that even if a state was ready to push resistance to the point of rebellion, its desperation would avail it nothing.

Three new articles of the Constitution expressed the victory of the Union. The Thirteenth Amendment, of 1865, prohibited slavery and involuntary servitude, whether imposed by a state or by an individual, and authorised the Congress to legislate on the subject. In contrast to this provision, the Fourteenth and Fifteenth Amendments, 1868 and 1870, were restrictions not on individuals but solely on states. The Fourteenth forbade the states to deny "equal protection of the laws," and imposed on states a traditional but vague canon of just treatment, "due process of law." The Fifteenth forbade the states to abridge voting rights on racial grounds. Unlike the power to raise armies, to control interstate commerce, and to eliminate slavery, these latter two amendments gave the central government power to correct only public injustice, only wrongs imposed by government. Much of the judicial consideration of racial discrimination since the Civil War has turned on this distinction between public and private wrong. It is this

[16] See "Documents Illustrative of the Formation of the Union of the American States," House Document No. 398, 69th Congress, 1st Session (1927), pp. 1009–1065.

distinction which presents the largest legal obstacle [17] to equality of status for the negro in the United States of today.

Before dealing with the attitude of the judiciary to this problem it may be well to say a word about the American judicial organisation. Judicial power is divided between federal and state courts in a unique manner and one little understood elsewhere—not unnaturally. Throughout the Union separate hierarchies of state and federal courts operate side by side. The United States Supreme Court surmounts the federal hierarchy and also has power in certain circumstances to review the decisions of the highest state courts. The rules for determining whether the state or federal courts have jurisdiction are complicated. As with legislation, residual power is reserved to the states but the federal courts are given competence in a wide range of cases, depending sometimes on the nature of the issue concerned and sometimes on the diversity of citizenship of the parties. Of particular importance for our present purposes is the rule that generally the federal courts have jurisdiction—but not exclusive jurisdiction unless they exercise their power of removing a case from the state court—whenever a federal question is in issue. Hence the federal courts have jurisdiction when the question is whether state legislation is invalid as conflicting with the federal Constitution, for this raises a federal question.

Though party political considerations may be, and often are, a factor in the appointment of a federal judge, his tenure of office is secure and, unlike most state judges, not dependent on the continued good will of the local electorate or government. Hence a federal judge is less exposed to local passions and pressures. On the other hand, a judge of the lower federal courts is likely to be the product of the environment in which he sits and to share the basic beliefs and, to some extent, the prejudices of the locality. It is, therefore, greatly to the credit of the federal judges in the South that they have loyally followed and applied the recent decisions of the United States Supreme Court, with which, it might be assumed, some of them are out of sympathy.

Two judicial landmarks, established in the last twenty years of the nineteenth century, fixed for a long time the pattern of the negro's rights under the Fourteenth Amendment's due process and equal protection clauses. The first of these was a group of simultaneous decisions now known as the Civil Rights Cases.[18] Here the Supreme Court held in 1883 that federal legislation forbidding innkeepers, theatres and passenger-carriers to discriminate for racial reasons was *ultra vires* the federal Congress because the Fourteenth Amendment forbade only unequal treatment by public

[17] See, however, the injunction of private persons interfering with officials willing to desegregate, exemplified in *Brewer* v. *Hoxie School District*, 238 F. 2d 91 (8th Cir. 1956); see footnote 46, *infra*. The legal obstacles to complete desegregation, such as they are, do not present the most troublesome problems. The emotional commitments of large numbers of people in the affected states are more difficult.

[18] 109 U.S. 3 (1883).

agencies, and authorised no federal law regulating non-governmental groups.

In these Civil Rights Cases, Associate Justice John Marshall Harlan, of Kentucky, one-time colonel of a Union regiment in the Civil War, dissented from the majority which had thus limited the power of the Union government to correct private discrimination against negroes. Harlan thought that the prevailing opinion rested (as he wrote)

> "upon grounds entirely too narrow and artificial. . . . Constitutional provisions, adopted in the interest of liberty, and for the purpose of securing, through national legislation, if need be, rights inhering in a state of freedom, and belonging to American citizenship, have been so construed as to defeat the ends the people desired to accomplish, which they attempted to accomplish, and which they supposed they had accomplished by changes in their fundamental law."

Harlan's thesis was that the Thirteenth Amendment, abolishing slavery, authorised the Congress to forbid "burdens and disabilities which constitute badges of slavery and servitude," even if not imposed by state governmental authority. He found in the authority to uproot slavery the authority to forbid slave-quarters, or their successor-places in railway trains. If his view had been accepted by the court, there would be authority for the Congress to forbid segregated negro schools, whether private or public, and to forbid individuals to interfere with negro school-children. But the majority of the court thought otherwise. The Civil Rights Cases still stand as a legal barrier to direct federal regulation of non-governmental education or of individual racial injustice.

The second of the two landmark decisions was the much discussed "equal but separate" case, *Plessy* v. *Ferguson*, decided in 1896.[19] It has lately been overruled, after a troubled career of fifty-eight years. It concerned a Louisiana statute of 1890 which required railways to provide "separate but equal accommodations for the white and coloured races," and required passengers of each race to keep to their own places. Plessy, one-eighth negro, who refused to stay in the negro car, was arrested and prosecuted in the Louisiana courts. After procedures not here important he found himself contending in the Supreme Court of the United States that the Louisiana statute was unconstitutional under the equal protection clause of the Fourteenth Amendment. His argument was rejected by the court, which, over another dissent of Mr. Justice Harlan, held that compulsory segregation was not denial of equal protection of the law if only the facilities, though separate, were equal for negroes and whites. The court reasoned—

> "Laws permitting, and even requiring their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other. . . .

[19] 166 U.S. 537 (1896).

> The most common instance of this is connected with the establishment of separate schools for white and coloured children. . . ."

For the moment this triumph of the logical over the obvious was a victory for negro segregation. But within it were troubles for segregationists, as the future was to show; and the willingness of the Supreme Court to overrule itself remained to give hope for those who favoured negro equality. 1927 was the last year in which segregationists could take much comfort from a decision following *Plessy*. The Louisiana courts had denied to a child of Chinese ancestry an order for compulsory admission to a public school for whites, and in November, 1927, the Supreme Court unanimously affirmed the Louisiana judgment.[20] But in 1938 the Supreme Court held that Missouri must admit a negro to its State University Law School, because no equivalent school for negroes was maintained by that state.[21] Payment of tuition for the negro at an out-of-state institution was not an equivalent. Equality in fact was required as a condition of separateness, and this requirement was to prove expensive for the segregating states. In 1950 the Supreme Court evaluated two publicly maintained law schools in Texas, one for whites, the other for negroes, and held that a plaintiff negro must be admitted to the white school as the negro school was inferior.[22] Lower federal courts were comparing the educational facilities of state grade-schools, and requiring that the negro schools be improved if they were to be maintained separately.[23] Some southern states launched extensive programmes for improving their negro schools. In a later 1950 case the Supreme Court held that Oklahoma was denying equal protection of the laws to a candidate for an advanced degree at the State University, when he was assigned to a separate row of seats specified for negroes in the common classroom, and to a dining table specified for negroes in the common cafeteria.[24] And on May 17, 1954, that court, in a unanimous judgment, finally overruled *Plessy* v. *Ferguson*, stating: " . . . in the field of public education, ' separate but equal ' has no place. Separate educational facilities are inherently unequal." [25]

Some critics of this decision have commented adversely on its assertedly sociological rather than legal character; and have questioned the propriety of reliance on testimony, given at the trial of the cases, concerning the psychological effect of segregation on

[20] *Gong Lum* v. *Rice*, 275 U.S. 78 (1927).

[21] *Missouri, ex rel. Gaines* v. *Canada*, 305 U.S. 337 (1938).

[22] *Sweatt* v. *Painter*, 339 U.S. 629 (1950).

[23] The complications involved are discussed and the cases are cited in Leflar and Davis, " Segregation in the Public Schools—1953 " (1954) Harv.L.R. 377, 392 *et seq.*

[24] *McLaurin* v. *Oklahoma*, 339 U.S. 483 (1950).

[25] *Brown* v. *Board of Education*, 347 U.S. 483 (1954); see accompanying case involving schools in the District of Columbia, *Bolling* v. *Sharpe*, 347 U.S. 497 (1954).

negro children.[26] But segregation laws cannot be tested in a vacuum. The point of the school cases is that the verbal symmetry of equal-but-separate is not true equality in practice. If this is a sociological question, it is one inherent in the terms of the Fourteenth Amendment. There was no child-psychology in the Supreme Court case holding invalid compulsory segregation in passenger buses, decided in a brief memorandum on November 13, 1956.[27]

The announcement in the School opinion of this great revision of constitutional doctrine was the beginning, not the solution, of judicial troubles connected with segregated education.[28] A year after the original school decisions the supplementary opinion of the Supreme Court on the form of the decree remanded the five cases to courts of first instance, directing them to implement the judgment "with all deliberate speed."[29] There remained the effective application of the principle in question to the defendant schools, and to the great number of publicly maintained schools not parties to these cases. There remained the difficulty of coping with various devices adopted by states in an effort to avoid the effect of the judgment. Finally, in addition to judicial problems there remained the practical difficulty of teaching in schools where educational levels of attainment differ between the white and the negro pupils of the same age, administratively possible while the races were schooled apart; but presenting serious practical problems where they are schooled together.

III

"The South" is, of course, a vague geographical expression. In the context of school segregation it may be taken to mean thirteen states on the south Atlantic and Gulf seaboards, running west as far as Texas and north to Virginia. These states vary in many ways: in contour, in industrialisation, in politics, and in the percentage of negro population. School segregation was not limited to these thirteen states; four others (bordering on the South) required it; a few others permitted it. In 1950 Mississippi had the highest percentage of negroes of any of the forty-eight states—45·4 per cent., compared to an average 22·5 per cent. in the thirteen southern states, and compared to about 10 per cent. of the general population of the United States. The proportion of negro population in the South may well be dropping because of northward migration.[30]

[26] See, for example, Herman E. Talmadge, *You and Segregation* (1955), 67 *et seq.*

[27] *Gayle* v. *Browder*, 77 Sup.Ct. 145, affirming 142 Fed.Supp. 707 (1956).

[28] ". . . the mere formulation of a relevant Constitutional principle is the beginning of the solution of a problem, not its answer." Frankfurter J. in *Illinois, ex rel. McCollum* v. *Board of Education*, 333 U.S. 203, 212 (1948).

[29] *Brown* v. *Board of Education*, 349 U.S. 294 (1955).

[30] For a careful survey of the situation in southern schools shortly before the Supreme Court decision of 1954, see Leflar and Davis, "Segregation in the Schools—1953" (1954) 67 Harv.L.R. 377. A review of the situation nearly

The reaction to the school decision in the states in which the problem was present has varied in proportion to the density of negro population. The border states in general proceeded toward desegregation, though not in every community, and not without unpleasant incidents. A special case was presented by the District of Columbia, which, of course, is in the direct control of the federal government. Here, where negro children form a majority of the school population, plans for integration were ordered to proceed as soon as the Supreme Court decision of May 17, 1954, had been announced. By the opening of school in September, 1955, new school district boundaries had been laid out on the basis only of location of the school buildings and residence of pupils, and without reference to race, and all pupils were allowed to attend desegregated schools. Some optional continuance in schools where children were already enrolled was permitted. This example, given by the Capital District of the United States, was heartening to those who hoped for rapid progress.

As was expected, the practical difficulties of joining the negro and white school populations, grade for grade, turned out to be considerable. Negro schools had in general not equalled white schools in academic standing, by a substantial margin. One need not conclude that the negro has any genetic intellectual disadvantage to recognise that environmental conditions, poverty, uneducated homes, and the like, can be a handicap to a whole population group, and can put most negro children in some schools behind most whites. The District of Columbia and other areas where desegregation is progressing are having their share of these troubles; school administrators are hopeful that special classes and extra effort will remedy them. But the majority of a Congressional sub-committee on December 28, 1956, handed down a report highly critical of conditions said to have been produced by the desegregation of schools in the District of Columbia, recommending a return to separate schools for negroes and whites.[31] Any such reversal of policy seems inconceivable; but this action by a subcommittee of the national legislature demonstrates the practical difficulties inevitable in so fundamental a change as that produced by the desegregation cases.

Between the Supreme Court's school decision of May 17, 1954, and the month of August, 1956, ninety-five law suits concerning the

two years after the 1954 decision, including a discussion of the percentage of new population, appears in McKay, "With All Deliberate Speed—A Study of School Desegregation" (1956) 31 *New York University Law Review* 991—an admirable analysis to which this paper owes much. An impartial, factual and current account of the situation as it develops can be found in the monthly *Southern School News*, published at Nashville, Tennessee. A convenient publication of current material is *Race Relations Law Reporter*, published by Vanderbilt University School of Law. The question of northward migration of negroes is discussed in *Life*, November 12, 1956, p. 59.

31 *New York Times*, December 29, 1956, p. 1, col. 1; "Report of the Subcommittee to Investigate Public School Standards . . . in the District of Columbia," House Comm. on D.C., 1957.

question of racial segregation were pending in the courts in affected states: eighty-four pieces of pro-segregation state legislation were enacted between the decision of the 1954 case and October, 1956.[32] Eight states of the forty-eight—all in the south-east—Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi and Louisiana, have made no start on desegregation; but instead, by multiple hasty statutes, by executive resistance supported by popular pressures, seek to postpone what they must know is inevitable. The number of law suits far outruns the law reports; the inquirer must learn of new statutory experiments in delay by reading the daily papers. The student of laws comes to feel that he has abandoned his proper subject, and has become a chronicler of current events. To attempt an itemised catalogue of all this would weary the eye and confuse the mind. It is more useful to try to identify and arrange the types of resistant legislation and the trends of judicial decision.

Analysis of the modes of opposition discloses several patterns. Simple failure of the states or their municipalities to police private disorder suggests itself at the start. A group of private men or women who attempt to block the way of pupils to school are not the state. The Fourteenth Amendment forbids a state (which includes a state's school authorities) to treat negroes discriminatorily; but state inaction is not state action. Failure of state officials to suppress private disorder is not the same as action by officials in disregard of the Supreme Court's ruling. School administrators who are willing to comply with the decree by accepting white and negro alike, but who are picketed by hostile citizenry, may in fact be unable effectively to comply with the new requirement of equality. For the present, however, official willingness to accept the negro is not present in the grade or high schools of the eight recalcitrant states, where even the form of desegregation is unacceptable politically. Thus far there is in each of these states one or more forms of official resistance to compliance.

Of these forms the simplest is a decision to wait for compulsion. Technically, the five actions decided on May 17, 1954, affected only the five school units there before the court. To be sure any other school authorities undertaking to segregate by race will in the long run clearly have a similar result in the Supreme Court. This prediction can be made with the more confidence since the United States Supreme Court on November 13, 1956, held unconstitutional state laws requiring segregation by race in public omnibuses.[33] Still any defendant unit may take advantage of whatever procedural delays are available, not only before, but after, final judgment. The change from a dual system of schools to a single one is complicated

[32] The figures on the volume of litigation and legislation are taken from *The Southern School News*, August, 1956, p. 1, col. 1, and October, 1956, p. 1, col. 4.

[33] *Gayle* v. *Browder*, 77 Sup.Ct. 145, affirming 142 Fed.Supp. 707 (1956).

even where the authorities, as in the District of Columbia, are earnestly working to speed it along. District lines have to be redrawn; bus routes changed; teachers, both negro and white, may have to be reassigned; disparity in the scholastic attainment of different groups has to be ironed out. Thus no judge should or will order instantaneous desegregation on pain of contempt. The Supreme Court's direction that the operation proceed "with all deliberate speed" allows for a reasonable period to work out the change-over. Even if cited for contempt for failure to desegregate, a school administrator can for a considerable time say, somewhat convincingly, that he has thus far been unable to plan the necessary changes. Courts properly require complainants to exhaust available administrative remedies before starting suit. While federal courts are now handing down judgments holding that administrative remedies are exhausted, still the procedural time lag in general permits a delaying action of considerable duration.[34]

The mystique of words is as prominent in the law as anywhere else, and the recalcitrant south has sought for a word to legitimate its refusal to do what it knows it finally must. Such a word is "interposition." It carries overtones of the eighteenth century, of the Founding Fathers, of the days of Virginia's lead in constitutional statesmanship; for it derives from a phrase of James Madison and from an idea of Thomas Jefferson. On December 24, 1798, the Virginia legislature adopted a resolution drawn by Madison, protesting the federal Alien and Sedition Acts of that year. Kentucky had already adopted a comparable resolution drawn by Thomas Jefferson, then vice-president of the United States, but to Madison and Virginia is due the language popular today. The Virginia legislature, in 1798, after reciting that the several states were bound by the federal compact no farther than its "plain sense and intention," went on to state—

> ". . . that, in case of a deliberate, palpable, and dangerous exercise of other powers, not granted by the said compact, the states, who are parties thereto, have the right, and are in duty bound, to interpose, for arresting the progress of the evil, and for maintaining, within their respective limits, the authorities, rights, and liberties, appertaining to them." [35]

The flaw in this concept lies in the constitutional function of the Supreme Court. If a federal union of states is to stay united, some

[34] The plaintiffs were held not to have yet exhausted administrative remedies in *Robinson* v. *Board of Education of St. Mary's County*, Maryland, 143 Fed. Supp. 481 (D.C.D.Md., 1956). The process was held complete in *Bush* v. *Orleans Parish School Board*, 138 Fed.Supp. 336 (E.D.La., 1956), affirmed by the U.S. Court of Appeals for the 5th Circuit, March 1, 1957, and in *Thompson* v. *County School Board of Arlington County* (Va.), 144 Fed.Supp. 239 (D.G.E.D.Va., 1956). A case similar to the latter, *Allen* v. *School Board of City of Charlottesville, Va.*, decided by Judge Paul of the D.G.W.D.Va. on July 12, 1956, is reported in *Southern School News* for August, 1956, p. 12, col. 2. Community dissatisfaction alone is not an excuse for delay. *Jackson* v. *Rawdon*, 235 F. 2d 93 (C.A. 5, 1956).

[35] 4 Elliott's Debates 528 (1936).

federal agency must be entrusted with the competence to decide what federal law is binding on the states; and in the United States that agency is the Supreme Court. Again and again in its history that court has been obliged to decide some case which, in effect, limited the power of some state. Repeatedly the court has declared that one or another state must accept a federal policy distasteful to it. The invention or revival of a word does not change this constitutional principle.

Whatever that word was—" interposition " in 1798, or " nullification " which Senator Calhoun of South Carolina popularised in 1832, the intention was the same—that a state, which found some federal requirement distasteful, proposed simply to disregard it. The idea is, of course, inconsistent with survival of a united nation, and when plainly described is easily so recognised, but the word " interposition " is so reminiscent of the South's days of greatness, that it can cover with its sentiment the bald truth of unlawful resistance. The doctrine was recently resurrected for school-desegregation purposes by a Virginia County Attorney, and has been restated in resolutions of six state legislatures—those of Virginia, Alabama, Georgia, Louisiana, Mississippi, and South Carolina.[36] Such resolutions have no mechanism of enforcement—they are cries of encouragement to the side; they are only intended to rally the faint-hearted with shouts of assurance that the spirits of the great are with them. Interposition has a past, but no future. It stands as only one more example of the occasional domination of word over understanding.

Massive inert resistance, encouraged by old and revered words, is not the only recourse of those who resent the segregation decisions. There are other devices, having a constitutional basis at least superficially more plausible. One of these is spurious classification. It depends on the obvious doctrine that a constitutional guarantee of equal protection of the law cannot possibly mean identical treatment, by government, of all human creatures. States can and do treat children differently from adults, men differently from women. Public institutions of learning quite properly treat the intellectually torpid differently from the brilliant. States can discriminate between persons in a multitude of ways, all without a suggestion that equal protection or due process of the law are thereby denied. But race we now regard as quite another matter. Since May 17, 1954, race may not lawfully be used by government, state or national, as a basis of classifying people; and this prohibition is precisely what arouses the American south. To

[36] Virginia Acts, 1956, Sen.Joint Res. 3: " . . . the States who are parties to the compact have the right, and are in duty bound, to interpose for arresting the progress of the evil, and for preserving the authorities, rights and liberties appertaining to them . . . "; see also Alabama Acts, 1st Spec.Sess. 1956, Act No. 42; Georgia Laws 1956, Res. Act No. 130; Mississippi Laws 1956, Senate Concurrent Res. 125; South Carolina Acts, 1956, No. 914; Louisiana House Concurrent Res. No. 10, 1956, 1 Race Rel. Rep. 753 (1956).

escape this prohibition the proposal emerges to classify schoolchildren on some criterion other than race, but to select a criterion which by coincidence will result in racial distinction. I can illustrate by an oversimplified supposititious case. Suppose that in some state a statute is passed reciting in its preamble that in elementary and high schools only pupils of the same age and of the same educational achievement shall be taught together; it directs the school authorities to classify pupils accordingly. Here is no mention of race; one may confidently say that a system in which no thirteen-year-olds were schooled with twelve-year-olds, and in which advanced thirteen-year-olds were taught separately from retarded thirteen-year-olds, would survive all tests of equal protection of the law. But if in practice, as actually administered, this system produced one school to which all white children aged thirteen were sent as advanced, and another to which all negro children of like age were sent as retarded, it would become suspect at once. The coincidence is too perfect for credibility. The federal courts would not be required to accept as unchallengeable a state administrative officer's announced conclusion that no negro thirteen-year-old is bright enough to study in school with the average of thirteen-year-old whites. Judges will examine for themselves the question whether the classification, purportedly made on the basis of learning, is actually a pretence to permit continued classification by race.

Federal courts in the United States have met and coped with this device before now, in the field of criminal procedure. Undoubtedly, all states prescribe some criteria of intelligence for the selection of trial jurors. In several notable cases negroes convicted of crime have obtained reversals of their convictions on the ground that in the selection of the panel of grand or petit jurors negroes were intentionally excluded because of their race. Testimony by the officers who selected the panel that the exclusion of negroes was only coincidental, that it just so happened that no negro had the requisite qualities, has been rejected by the Supreme Court of the United States.[37]

Nevertheless, since the desegregation decision, several states have adopted legislation indicating reliance on the theory of spurious classification. Louisiana furnishes an extreme example. A statute of 1954 provides—

> "All public elementary and secondary schools in the state of Louisiana shall be operated separately for white and coloured children. This provision is made in the exercise of the state police power to promote and protect public health, morals, better education and the peace and good order in the state, and not because of race."

[37] See *Norris* v. *Alabama*, 294 U.S. 587, 598, 599 (1935); *Smith* v. *Texas*, 311 U.S. 128 (1940).

This was promptly held unconstitutional in a United States District Court decision of February, 1956.[38]

Another legislative provision which has appeared in at least six of the states resisting desegregation is the "school placement law." North Carolina, for example, requires Boards of Education

> "to provide for the enrolment of pupils in the respective schools located within such county or city administrative unit so as to provide for the orderly and efficient administration of such public schools, the effective instruction of the pupils therein enrolled and the health, safety, and general welfare of such pupils."[39]

These enumerated considerations, eminently suitable and customary as criteria for classifying school-children, are surely beyond attack on constitutional grounds. They may not, however, be used as a cover for classification which is in fact predicated on race, and the federal courts will scrutinise the actual administration of the statute to determine the facts. In 1886 the Supreme Court coped with a similar problem concerning Chinese laundrymen in California. By a San Francisco ordinance a licence was required for any person to maintain a laundry in a wooden (and therefore inflammable) building. Applications of two hundred Chinese for licences were denied, while all the non-Chinese but one were granted licences; other conditions were equal. The Supreme Court had no difficulty in concluding that such enforcement of the ordinance was an unconstitutional denial of equal protection of the laws. Its opinion read, in part—

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."[40]

Residence is another familiar criterion for the allotment of children to schools. No constitutional obstacle prevents any state from defining the boundaries of school districts and requiring that all children living in a district go to their own school. Districts can be so devised as to contain mostly white or mostly negro children, but this device (another sort of spurious classification) cannot very effectively achieve complete segregation. In very few areas large enough for a school is the population entirely negro or non-negro. And even where such conditions exist, the increasing mobility and

[38] See Louisiana Act 556 of 1954; this statute was passed pursuant to the authorisation of the 1954 amendment to the Louisiana Constitution, Art. 12, s. 1, whose terms were similar to those of the statute. Both necessarily fall under the opinion of the U.S. District Court in *Bush* v. *Orleans Parish School Board*, 138 Fed.Supp. 336 (E.D.La., 1956), affirmed by the U.S. Court of Appeals for the 5th Circuit, March 1, 1957.

[39] No.Car.Gen.Stat.Ann. §§ 115–117 (Ann.Supp., 1955).

[40] *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886); see pp. 373, 374.

self-confidence of the negro citizen, and his rise in economic status, inevitably lead him to seek better living quarters, and must in time threaten to upset any complete segregation by residence. In 1917 a unanimous Supreme Court declared unconstitutional a city ordinance which denied to coloured persons and to white the right to move into houses in city blocks in which the greater number of houses were occupied by the other race.[41] In 1948 that court reversed a Missouri judgment which had enforced a private restrictive covenant intended to achieve a similar end. The Supreme Court recognised that two individuals might agree between themselves that neither would sell to a negro, and as no state action had thus far occurred, the execution of the agreement was not affected by the Fourteenth Amendment. However, as soon as a state court gave judgment enforcing the restrictive covenant, the state so acting through its judge had denied to the negro the equal protection of the laws which is commanded by the Fourteenth Amendment —a command applying to judges equally with administrators and legislators.[42]

Of course it is theoretically possible to find a school district exclusively occupied by whites in which no owner of a house will ever consent to a negro purchase; and obviously the federal Constitution does not command that any man sell his house to a negro if the owner prefers not. Such pure-white areas are rare, however, if they exist at all, and as a practical matter the possibility of maintaining a private united front in land ownership seems not a major factor in the segregation problem.

A more imposing device is the proposal by various states as a last resort to disestablish all public schools. To repeat a monotonous fact, neither the Fourteenth Amendment nor any other part of the federal Constitution, as construed in the Civil Rights Cases of 1883, gives the Government of the United States any authority over admissions into private schools. It is the states which are constitutionally required to protect the negro equally with the white man. If any state chooses to abandon public education, the Fourteenth Amendment has no state action on which to operate. The state is then with complete impartiality neglecting all children alike. To be sure infant literacy might thus be thrown out with the bath of interposition. Nevertheless, perhaps only as a threatening gesture, six states have adopted constitutional amendments or statutes allowing such disestablishment in case of need. South Carolina, for example, provided in 1955 that all appropriations of school moneys should cease and become inoperative

> "... for any school from which, and for any school to which any pupil may transfer pursuant to, or in consequence of, an

[41] *Buchanan* v. *Warley*, 245 U.S. 60 (1917).
[42] *Shelley* v. *Kraemer*, 334 U.S. 1 (1948).

> order of any court, for the time that the pupil shall attend a school other than the school to which he was assigned before the issuance of such court order." [43]

Two obstacles, one practical and one legal, stand in the way of the success of this provision. The practical one is the devotion of the American people to public education for their children. One has only to see the elaborate, costly school buildings in any American state, and the fleets of school buses that serve them; one need only examine the tax burdens people will vote on themselves to provide these amenities; one need only at a Parent-Teacher Association meeting listen to the agonised outcry when some cut is proposed in school services, to realise the deep commitment of the people to public schooling. In no district will they readily give this up, even to avoid desegregation. A more likely device is the appearance but not the actuality of ending public schools, another move in what military men would call delaying action in successive positions.

Assuming, however, as the South Carolina statute suggests, that the publicly maintained schools of one part but not all of a state were disestablished, an interesting and so far unsettled question of constitutional law would be presented. The state is required to treat all alike save when some reasonable justification arises for differentiation in treatment. There is always a certain amount of variation in the quality of schools as between one district and another in any state. Education is in part locally financed, and one district may cling to its one-room "little red schoolhouse," while another district by itself or jointly with others may tax itself to provide an academic acre of brick, glass and steel. This disparity is a practical means of reconciling financial ability with educational need, and in the absence of a racial question, intervention by a federal court to equalise the districts at the suit of a disgruntled parent seems incredible. But suppose an aggravated hypothetical example: two districts in say South Carolina lie side by side. One district, made defendant in a suit, is ordered to desegregate and thereupon under the state's legislation ceases to maintain its schools. Is not a child in this district, whether black or white, denied equal protection by the state, whose creatures all school districts are? His friend a few hundred yards away, across the border, in the adjoining district, has available free public schooling, denied to all children in the area of disestablishment. This problem has not yet been settled by the federal courts, but an analogous question has had a clear answer. In the days before 1954, when "equal but separate" was still a going doctrine, a number of cases arose in which negro children, through parents or guardians, sought to compel by court order the improvement of the separate negro school to a point where it substantially equalled that for whites. Federal courts passed on the question of equality in fact, or not,

[43] South Carolina Code, Annotated § 21–22 (Ann.Supp., 1955).

and were ready to order that the negro schools be equalised in proper cases.[44] One hesitates to believe that the courts will refuse relief where a unit of state government eliminates a school entirely, and does it for racial reasons, while leaving neighbouring schools in full operation.

Such examples of total abandonment have not yet appeared in the Supreme Court, and perhaps the case is unlikely to arise because of the devotion of the populace to some measure of public education. An alternative, proposed in Virginia under the name of the "Gray Plan,"[45] and similarly proposed elsewhere, would provide tuition grants to parents who live in communities where no schools are operating. Such a plan might be given state-wide application in a state such as South Carolina if it were to carry out its proposal to discontinue its public schools entirely. One might then see what had once been a system of public schools suddenly becoming "private,"—teachers yesterday in public employment today employed by nominally private schools; perhaps school premises lately public-owned but now transferred to private hands; the flow of funds still coming from the public treasury to school-maintenance, but routed through the parents; the "private" schools so created continuing segregated by races but claiming not to represent any state action, and so claiming to fall outside the effect of the Fourteenth Amendment which forbids only states to act with unjust inequality. The device is not really convincing. The aggregate of parts reaches a whole which amounts to state schools, and the Supreme Court will not be so blind as to mistake the hands of that control. The device has a speciousness suggestive of the classification scheme. Both depend on the ill-founded theory that the Supreme Court of the United States cannot tell a hawk from a handsaw.

IV

In the first of his lectures on Law and Public Opinion, Dicey well said:

[44] See n. 23, above.

[45] The Gray Plan is described in the report of the Virginia Commission on Public Education; summarised and printed in part, in 1 *Race Relations Law Reporter* 241–247 (1956). A variant of the device of local abandonment discussed in the Gray report and enacted in North Carolina is the legislative permission to any local unit of government to provide a tuition grant for attendance at private school by any child whose parents do not wish him to attend an integrated school. This was provided by North Carolina, in Chap. 3 of the Laws of the 1956 Extra Session, enacted July 27, 1956. See 1 *Race Relations Law Reporter* 930 (1956). The constitutional problems are puzzling.

One does not at once see how a state denies equal protection of its laws where its public schools are open to all races alike; and where it offers to members of all races alike an optional equal scholarship award for those who prefer private schools. It is possible, however, that as actually administered, and unless coupled with repeal of compulsory attendance laws, the practical effect would be discriminatory against the negro. The expense of maintaining such a dual system might be prohibitive.

> "... that the existence and the alteration of human institutions must, in a sense, always and everywhere depend upon the beliefs or feelings, or, in other words, upon the opinion of the society in which such institutions flourish."

Dicey's added note that the authority of a Southern planter over his slaves rested at bottom upon the opinion of the negroes is subject to doubt. But the general proposition remains true that law can only operate effectively when it registers the opinion of a great majority and enforces it on a small dissenting minority. Probably this coercion can only function well when the recalcitrants are diffused throughout the general population. Where, as in the American south, those who resist are clustered together and form a substantial local majority, the difficulties multiply. The objectants obtain representation in the national legislature where, though a minority, they have had sufficient capacity for parliamentary manoeuvre to block passage of even that civil rights legislation which the Congress has constitutional power to pass. Their wishes, as must be expected, result in the election of some local officials who give little support to the policy of the Supreme Court's decision. A certain amount of this regional inequality is inevitable in every large country, and it is accentuated in the United States by the federal constitution which was carefully devised to insulate parts of the nation, as to many matters, from interference by the central government. Private lawlessness such as occurs when a crowd of roughs interfere with someone in his ordinary pursuits is, in general, subject only to local governmental control. The federal judiciary, however, under a decision of the United States Court of Appeals for the Eighth Circuit, handed down in October, 1956, can in such a situation enjoin private obstruction which threatens to prevent local authorities from voluntary compliance with the desegregation decisions.[46] The effect of this precedent on federal intervention in cases of non-governmental disorder may be surprising.

The Supreme Court's desegregation decisions, and the long train of lower court cases already following them, are only part of the factors which are changing the negro's status in the American south. Even the eight recalcitrant states are not solid blocks of people all opposed to desegregation. Any such suggestion overlooks, for one thing, the negro population. The negro is steadily becoming more prosperous, better educated, and more self-confident. His political activity is increasing, helped by a series of Supreme Court decisions which have invalidated electoral devices intended to deny the negro his vote.[47] If the full force of Mississippi's 44 per cent. of negroes were applied at the polls, the anti-desegregation strength of local government would be much reduced. The desegregation of public transportation, announced by

[46] *Brewer* v. *Hoxie School District*, 238 F. 2d. 91 (8 C.A., 1956).
[47] *Smith* v. *Allwright*, 321 U.S. 649 (1944); *Terry* v. *Adams*, 345 U.S. 461 (1953).

the Supreme Court on November 13, will be an encouragement to negro opinion.

Nor, even in the deep South, is white opinion a monolithic mass. The Roman Catholic Church has been conspicuously on the side of desegregation, and in Louisiana this is a strong force. The churches in other states have reacted similarly. The younger generation of whites is far more willing to accept negroes than its fathers were. The band of states surrounding the eight recalcitrants are giving daily examples of successful ending of racially restricted schools. The time will come when resistance, even in the eight states, becomes spotty, divided, uncertain. Then the judicial function will play its normal effective part, without the obstacle of comparatively solid community sentiment.

One might wonder whether any further dramatic judicial changes in doctrine, such as that of 1937 respecting federal power over commerce, or that of 1954 respecting "equal but separate," may be expected in the field of race relations. The Supreme Court during the last twenty years has shown a somewhat surprising willingness to overrule itself. Two of the most striking instances have occurred in the matter of racial injustice, one in the desegregation cases, the other in an opinion holding that action of assertedly private Texas citizens, making rules for the conduct of "private" all-white primary elections, was subject to the same federal constitutional controls as though it were action by public officials of the state of Texas.[48] The desegregation decisions of 1954 overruled the fifty-eight-year-old "equal but separate" doctrine. The Civil Rights Cases are only thirteen years older; there, as in *Plessy* v. *Ferguson*, Mr. Justice Harlan dissented; in both his dissents he asserted that the underlying cause of white injustice to the negro was the negro's former slavery. In each he asserted that the Thirteenth Amendment of 1865 abolishing slavery authorised the Congress to abolish all the elements of slavery; and that the compulsory separation of the negro from his white fellow-citizens was a relic of that servile status. This is a strong argument justifying federal legislation to prevent even private racial oppression. The old-time slave galleries shown to tourists in some southern churches suggest the negro schools of today. It may yet be that the idea put forward by John Marshall Harlan in 1883 can become the doctrine of the Supreme Court, and that the Government of the United States will have, and will use, power to legislate against even the private vestiges of negro slavery. But perhaps by that time such a change will have been made unnecessary by the reawakened conscience of the whole American people.

Arthur E. Sutherland, Jnr.*

[48] *Terry* v. *Adams*, 345 U.S. 461 (1953).

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VICARIOUS LIABILITY AND THE MASTER'S INDEMNITY

THE decision of the House of Lords in *Lister* v. *Romford Ice and Cold Storage Co., Ltd.*[1] settles the rule that when a master is made vicariously liable for the fault of his servant, he can claim an indemnity against the servant, except, perhaps, in the field covered by the scheme of compulsory third-party insurance. The consequences of this decision are likely to be far-reaching, and they hold possibilities of great hardship for employees. Crushing liability in tort or contract may be of small significance to the very low-paid worker, for his poverty protects him. But when, as is now the case, the class of employed people includes the highly paid managers of industry as well as a host of professional persons and skilled artisans, nearly all of whom spend their lives accumulating a little property, by way of savings and endowment policies, against their old age, the enforcement of the employer's right of indemnity is likely to cause a devastation of individual fortunes and a frustration of hopes on a scale that can hardly fail to cause concern.

If the master wishes to assert his right of indemnity, he will generally do so in the injured party's action, bringing in the servant by a third-party notice if the servant is not already joined as co-defendant. The advantage of this course is that the servant becomes bound by the judgment in the action, and cannot raise anew the issue of his negligence. If the master settles the injured party's claim out of court, and then sues his servant for an idemnity, he runs the risk of failing to make out negligence in the servant.[2] The effect is likely to be that the master, or an insurance company defending the claim on his behalf, will be less willing to settle out of court. Unless the servant's negligence or other tort is clear, or the servant admits liability, it may pay the master to put the injured party to proof, knowing that the servant will have to reimburse the costs as well as the damages.

The seriousness of the position for the servant is increased by the fact that the decision to sue him is not necessarily in the employer's hands. In *Lister's* case, the employer who had been made liable in damages had had those damages paid for him by an insurance company. It was this company that, claiming to be

[1] [1957] 2 W.L.R. 158.

[2] The master can give evidence of the amount of the settlement, and support it by showing that it was a reasonable settlement; if this evidence is accepted, the master may be allowed the amount of the settlement, plus costs, as the measure of his indemnity against the servant. See *Biggin & Co., Ltd.* v. *Permanite, Ltd.* [1951] 2 K.B. 314 (C.A.). But the issue of the servant's negligence is still at large between the parties, and if it is held that the servant was not negligent, the claim for an indemnity must fail.

subrogated to the employer's rights, successfully sued the servant in the employer's name, though against his wishes. It follows that the friendliest relation between the employer and his staff can now be disrupted, and the employee impoverished, by the action of an insurance company, which finds itself in the happy position of having received premiums for a risk that it does not have to bear.

Where the injured party's action is tried by jury, it may be important for counsel for the servant to inform the jury of the master's right of indemnity. It is notorious that juries will give damages against a large concern when they would not give damages against the individual servant. Unless the jury are made aware of the new rule, they may place a liability upon the servant which they never intended. On the other hand, if the new rule causes a jury (and perhaps even a judge) to be more reluctant to find for a plaintiff, it may bring about a subtle change in the administration of the law of tort.

These consequences may be avoided if insurance companies make a practice of not enforcing their rights, or if new standard terms are worked out in insurance policies to exclude recourse against servants, or if, through the exercise of pressure by trade unions and professional bodies, a new term is included in contracts of employment, or if it becomes the practice of employees to insure themselves (a gratifying prospect for the insurance companies, who will thus be able to insure risks twice over), or finally if legislation is introduced to reverse the practical effect of *Lister's* case. It is the object of this article to consider some of the theoretical considerations and ultimate questions of social policy which are involved in the decision as it stands.

History of the Rule

The doctrine of vicarious liability in tort is more than 250 years old; yet the question whether the servant is liable to indemnify the master has not directly come before the courts until comparatively recent times. The reason is not to be found in the former rule against contribution between tortfeasors, because even at common law there was an exception from this rule where one of the tortfeasors was morally innocent, in which case he was allowed to recover an indemnity from the other.[3] A practical reason was, no doubt, the general poverty of servants, which made the right of recourse, assuming that it existed, an unprofitable one. At the present day a servant is more likely to have earnings or savings which make him worth suing, particularly since the extension of the class of servants or quasi-servants to include professional men like surgeons. Also, it may be important to establish the servant's liability as a step towards claiming against an insurance company.

3 The rule is usually attributed to *Adamson* v. *Jarvis* (1827) 4 Bing. 66, but is much earlier.

At least since the time of Lord Holt it has been clear that a servant is liable for his own misfeasances and is not protected by his master's vicarious liability.[4] In the year 1792 a court assumed that the master who was made responsible would have a right of action against the servant, no doubt for an indemnity.[5] This was incidental to a ruling that the servant could not give evidence in an action against the master, since he was a person interested in the outcome of the action. A number of other cases applied the same rule.[6] The rule of evidence excluding interested parties was abolished in 1833, and after that there appears to be no direct and positive pronouncement on the present subject till 1938, when Tucker J., as he then was, gave the master an indemnity under the Tortfeasors Act in respect of an intentional tort by the servant (a schoolmistress who boxed a boy on the ear).[7] Meanwhile, it had been regarded as clear law, even before the Tortfeasors Act, that the employer of an independent contractor who was made vicariously liable for the tort of the contractor had a right of indemnity against him.[8]

At this date, then, all the authorities were in favour of the master's right of indemnity. Byrne J. in *Gregory* v. *Ford* (1951)[9] created an exception to the right for the commonest case of negligence. He held that there was an implied term in a contract of service that the master would comply with the insurance provision of the Road Traffic Act, 1930, in respect of vehicles that he required the servant to drive, and that if the master were in breach of this term, the servant having to pay damages could recover an indemnity from the master. Three years later, in *Semtex, Ltd.* v. *Gladstone*,[10] Finnemore J. ruled that in cases not covered by the Road Traffic Act, no term could be implied into a contract of service that the master would keep up a policy of insurance to indemnify the servant against the consequences of his negligent driving. The learned judge accepted Byrne J.'s decision only on the narrow ground on which it actually proceeded, *viz.*, the provision in the Act of 1930. He held that, apart from this judicial interpretation of the Road Traffic Act, the master was entitled to an indemnity against the negligent servant, either under the Tortfeasors Act or because the servant was guilty of a breach of his contract of service. It followed that if the servant injured another person by careless driving, and the master was made liable, the master having insured the servant could recover an indemnity from him, and the servant was then left to enforce any right of indemnity he might have against

4 Holmes in (1891) 4 H.L.R. at 364.
5 *Green* v. *New River Co.* (1792) 4 T.R. 589.
6 See J. A. Jolowicz, "The Right to Indemnity between Master and Servant," [1956] C.L.J. 101.
7 *Ryan* v. *Fildes* [1938] 3 All E.R. 517.
8 *Honeywill & Stein, Ltd.* v. *Larkin Bros., Ltd.* [1934] 1 K.B. 191 (C.A.).
9 [1951] 1 All E.R. 121.
10 [1954] 1 W.L.R. 945.

the insurance company.[11] The point is of practical importance where two insurance companies are involved.

A master cannot obtain a complete indemnity from his servant under the Tortfeasors Act if he has been guilty of personal negligence, or of negligence through another servant contributing to the accident. In such circumstances there must be a reduction to allow for this negligence. This was decided by the Court of Appeal in *Jones* v. *Manchester Corporation.*[12] Whereas Singleton L.J. seemed to approve the rule that the master is entitled to an indemnity against a servant who is exclusively at fault, Denning L.J. denied it. He thought that in the absence of express stipulation the master had no absolute right to indemnity against his servant, but must seek the exercise of the discretion of the court under the Tortfeasors Act. The learned Lord Justice gave as one reason for this view the fact that the master and servant were joint tortfeasors at common law, and that there was therefore no contribution between them apart from statute. This opinion seems to attach insufficient importance to such pre-Act cases as *Adamson* v. *Jarvis* and *Honeywill & Stein, Ltd.* v. *Larkin Bros., Ltd.*,[13] neither of which cases were mentioned.

This was all by the way, but the point actually arose for decision in *Lister* v. *Romford Ice and Cold Storage Co., Ltd.*,[14] with which this article began. The facts were that P's servant D in the course of his employment and on private property negligently backed a lorry into his father, who was also a servant of P. The father sued P; P's insurance company settled the claim, and then sued D in P's name for an indemnity. It was held by the Court of Appeal, Denning L.J. dissenting, that the action succeeded, both under the Tortfeasors Act and because of D's breach of an implied term in his contract of service that he would carry out his duties with reasonable care. In the House of Lords the judgment of the Court of Appeal was affirmed on the point of implied contract by three law lords to two, the dissentients being Lord Radcliffe and Lord Somervell of Harrow. Their dissent was not, however, based on quite the same grounds as that of Denning L.J. The latter had repeated the opinion he expressed in *Jones* v. *Manchester Corporation*[15] that there was no implied term by the servant to indemnify the master against liability for the servant's negligence. The duties of care owed by master and servant to each were, he thought, duties

[11] *Ibid.*

[12] [1952] 2 Q.B. 852 (C.A.). This was an issue between hospital and doctor. A Ministry of Health circular of March 29, 1954 (HM (54) 32) now provides that when a hospital and a doctor who is a member of a Defence Society are possible defendants to a claim, they will not claim contribution against each other in open court, but will privately settle between themselves in equal shares, or such other proportions as they may agree. The object is to avoid weakening their common front against the injured plaintiff through mutual recriminations.

[13] Above, nn. 3, 8.

[14] [1957] 2 W.L.R. 158 (H.L.), affirming [1956] 2 Q.B. 180 (C.A.).

[15] [1957] 2 W.L.R. 158.

in tort only. As to the position in tort, the master could claim against the servant only under the Tortfeasors Act, which gave the court discretion to do what was just and equitable. By this reasoning Denning L.J. felt himself able to administer discretionary justice between the parties, and according to his philosophy "the risk should be borne by the undertaking as a whole rather than by the servant who happens to make a mistake, especially when he is working his master's machine." Quite apart from the statutory discretion, he was prepared to find an implied contract by the master whereby, when he is insured, he will not seek contribution or indemnity from the servant. Finally, Denning L.J. was prepared to give the Road Traffic Act a sufficiently extensive interpretation to require the servant driver to be insured, even in favour of fellow-servants, and even when he was not on a road.

In the House of Lords, even the dissentients refused to follow Denning L.J. in holding that the servant owed no contractual duty of care to his master. One of the arguments used by the learned Lord Justice against the implied contract was that this would enable the master to sue his servant for negligence although the master suffered no damage. Lord Somervell seemed to accept this conclusion as a true statement of the law, for he said that "there would be a breach [by the servant] although there were no damage." It is submitted, however, that this would be too wide an application of the general principle that an action can be brought for breach of contract without proof of actual damage. Although the principle is correct, the consequence does not follow. Instead of saying that the implied contractual term is not to behave negligently, it would be more reasonable to say that the implied contractual term is not to cause damage by negligence. Since such a term would only be broken when actual damage occurs, no action could be brought for merely nominal damages.

Where the dissentients in the House of Lords agreed with Denning L.J. was in making an implication in the contract which would protect the servant in respect of the master's insurance. Lord Radcliffe thought that where it is understood between the employer and employee that the employer will take out a policy of insurance against third-party liability under the Road Traffic Act, there is an implied term in the contract of employment that the employer will not seek idemnity from the servant. Lord Somervell took much the same point. He made it clear that his opinion was based on the common understanding between employer and employed rather than on the terms of the Road Traffic Act, though he said that the Act greatly strengthened the arguments for the term in question. The majority in the House of Lords (Viscount Simonds, Lord Morton of Henryton and Lord Tucker) found themselves unable to imply such a term, partly because they thought it impossible to be defined with precision.

The Exception Based on the Road Traffic Act

Reference has already been made to the decision in *Gregory* v. *Ford*, which made an exception from the master's right of indemnity in the field covered by compulsory insurance under the Road Traffic Act. The validity of this decision seems to have been accepted by both sides in *Lister's* case, the point about the latter case being that the accident occurred in circumstances which made the compulsory scheme of the Act inapplicable.

Benevolent though *Gregory* v. *Ford* was to the servant, it may be thought to rest on a misapprehension of the purpose and effect of the Act. Section 35 requires the user of a motor vehicle to have a policy of insurance against third-party risks; but, as everyone knows, the policy is required for the benefit of the third party, not for that of the assured. As Lord Tucker said in *Lister's* case, "sections 35 and 36 of the Act were not passed for the protection of the bank balances of car owners, or the life savings of their employees, but simply and solely to ensure that persons injured by the negligent driving of motor-cars who established their claims in court might not be deprived of compensation by reason of the defendants' inability to satisfy their judgments." In support of this opinion, it may be pointed out that there is nothing in the Act to prevent the policy containing a clause binding the assured to indemnify the company against all claims, and in fact section 38 expressly saves the validity of such a clause. It is quite common in policies of insurance to find a term under which the assured agrees to indemnify the company if a claim is made for damage resulting from the improper condition of the vehicle, and so far as the law is concerned the indemnity might be extended to all claims made under the policy. Such a policy would operate to protect the injured third party against the risk of insolvency of the assured, but it would not protect the assured from the liability to settle the damages himself. If this type of policy satisfies the Act, the master's implied obligation towards his servant to comply with the Act would presumably be satisfied if he took out a policy of insurance containing the indemnity clause. But this type of policy would not protect the servant from the liability to foot the bill resulting from his negligence.

If so much be granted, suppose now that the master does not insure the servant at all. Surely, the fact that the servant has to pay damages for his tort is not a matter of complaint against the master, in a claim based on the Road Traffic Act, because it is not a consequence of the master's breach of his implied obligation. The master could lawfully have performed his obligation in a way that would not have saved the servant.

Apart from this, it may be questioned whether the obligation to insure the servant is properly implied from the Road Traffic Act. The Act imposes a duty upon the person who uses a motor-vehicle as well as upon the owner who causes or permits the use

to see that the use of the vehicle is covered by insurance. There is nothing in the Act to suggest that the duty to insure rests more upon the master than upon the servant. Byrne J. decided *Gregory* v. *Ford* on the footing that a master who required his servant to drive a vehicle which the master had not insured would require him to commit an illegality, but strictly speaking this is not so, because there is nothing in law to prevent the servant insuring himself. To say that the master is under a duty to his servant to insure and pay the premium is to find in the Act a rule that is not there.

Lister's case decides that no term can generally be implied into a contract of service that the master will insure the servant. We may now expect to see the validity of the decision in *Gregory* v. *Ford* questioned. Its correctness can derive only from the terms of the Act, and yet it cannot demonstrably be founded upon the Act. Another dictum of Lord Tucker in *Lister's* case may be found to have considerable importance on this question. He said that one paragraph of the defence was " based on the erroneous assumption that the Road Traffic Act, 1930, imposes an obligation on the employer to take out a policy which will cover the personal liability of the servant while driving in the course of his employment: *cf. Ellis* v. *Hinds* [16] and *Lees* v. *Motor Insurers Bureau*,[17] the correctness of which decisions has not been challenged." The cases referred to decided that a policy taken out by the master in respect of his own liability satisfies the insurance provision in the Act. If this is so, it is impossible to see how the Act can be said to create any duty to insure the servant. Yet Lord Tucker seemed, in another part of his judgment, to admit the exception of such a duty under the Road Traffic Act. Lord Morton of Henryton expressed the contrary opinion, that the Act of 1930 made no difference to the terms to be implied in a contract of service.

There is a passage in the dissenting speech of Lord Radcliffe which is capable of causing difficulty in this matter of automobile insurance. The noble lord said:

> "I must call attention to . . . the almost intolerable anomalies which are involved in the respondents' argument. The situation is this. If an accident takes place through negligence, the person injured can sue either employer or employed or both of them. If he sues the employee alone, the latter calls on the insurance company for the cover which the employer has brought him; the insurance company has to provide the fund of damages required; neither the wages nor the savings of the employee can be touched to reimburse the insurers for the risk that they have underwritten. But if the injured person takes a different course, one which neither employer, employee nor insurance company can control, and sues the employer either alone or jointly with the employee, the position of the employee is, apparently, much worse and the

[16] [1947] K.B. 475, 484.
[17] [1952] 2 T.L.R. 356.

position of the insurance company is, apparently, much better. For now the latter can indemnify itself for the money it finds by getting it back from the employee in the employer's name and the former, instead of getting the benefit of the insurance which his employer was to provide is, in the end, the one who foots the bill."

It may be submitted with the greatest respect that this involves a misapprehension. The general—and disgraceful—rule of English law is that a person cannot sue on a policy of insurance merely because it has been taken out for his benefit[18]; there must be words in the policy sufficiently clear to create a trust. Therefore, an ordinary contract of insurance taken out by an employer for the benefit of his servant would confer upon the latter no right against the insurance company. Even if the employer purported to insure as agent for his servant, it would usually be difficult to find that the servant furnished any consideration. In this situation the servant has no right under the policy, whether the injured party sues the servant or the master. The only point is that if the injured party sues the master, who claims under his policy, the master can probably object to the company suing the servant in his name, because for the company to claim to do this would be a breach of their contract with the master to insure the servant.

In one exceptional case the servant is given a direct right under the master's policy. This is where the policy is taken out under the provisions of the Road Traffic Act.[19] It seems that this would not give a right to the servant if the accident happens in circumstances purported to be covered by the policy but for which there is no compulsory insurance, *e.g.*, not on a road. The question did not arise in *Lister's* case, because there the insurance company which claimed by subrogation a right of indemnity against the servant was not the company which issued a policy under the Road Traffic Act but another company which covered employers' liability. Lord Radcliffe's suggestion that if the servant had been sued directly he could have recovered from the employer's insurance company appears to be mistaken. The servant could not have recovered under the Road Traffic Act policy, if only because that presumably did not insure the type of accident which occurred, and which fell outside the terms of the Act.

Employer's Claim for Indemnity where he is Himself Negligent

The question may arise whether *Jones* v. *Manchester Corporation* (*supra*, p. 223) is still law. In that case it was held that the master cannot claim a complete indemnity if he has himself been guilty of fault, but must suffer a reduction in respect of his own fault.

[18] *Vandepitte* v. *Preferred Accident Corporation* [1933] A.C. 70 (P.C.).
[19] Act of 1930, s. 36 (4); *Tattersall* v. *Drysdale* [1935] 2 K.B. 174. The assured is bound by the terms of the policy: *Sutch* v. *Burns* (1943) 60 T.L.R. 1, 2.

This was under the Tortfeasors Act. Whether any reduction can be made in a claim by the master for breach of contract under the docrine of *Lister's* case presumably depends on whether the Contributory Negligence Act applies to a claim in contract.[20]

Opinions will differ sharply on the legal merits of the decision in *Lister's* case. But now that the House of Lords has spoken the important question is one of legislative policy. Should the law as now settled be qualified by legislation, and if so to what extent? This question cannot be answered without considering the theory underlying vicarious liability and the way in which this kind of liability actually operates.

The Older Justifications for Vicarious Liability

The theory underlying vicarious liabilty was the subject of lengthy but rather inconclusive discussion before the First World War. Since then the subject has been rather abandoned in England, and neither writers nor judges have taken account of important developments in thought on the other side of the Atlantic. Before coming to these developments, it is worth running through the older literature to pick out the main points.

We may start by dismissing the Latin and English maxims, beloved of judges, that are merely abbreviated or expanded restatements of the rule. This applies, in particular, to the *Qui facit* maxim, and the doctrines of implied authority and non-delegable duties.

Next, it seems that no profit is to be derived from examining the history of the rule. Holmes explained it as an anachronistic survival from early times[21]; Wigmore in reply argued that it was deliberately introduced by Holt C.J. shortly before 1700,[22] and this opinion is generally accepted.[23] On Wigmore's view, one might think that the justification for the rule could be picked out of the judgments of those judges who introduced and extended it. However, further reflection will show that this type of inquiry can only be of limited value. It may be that some of the early judgments truly state the reasons that commended themselves to the judges of the time; but this does not mean that these reasons will be equally acceptable today. It is possible for an institution introduced

[20] See my *Joint Torts and Contributory Negligence*, § 80.

[21] (1891) 4 H.L.R. 345, 5 *ibid.* 1, at 22–23.

[22] (1894) 7 H.L.R. 315, 383, 441, at 383, reprinted in a revised form in *Select Essays in Anglo-American History* (Boston 1909), iii, 474.

[23] Baty, *Vicarious Liability* (1916), Chap. 1; Holdsworth, viii, 472 *et seq.*; *cf.* Pollock and Maitland, 2nd ed., ii, 533.

It has been recently suggested that the imposition of vicarious liability was based on the principle of the family status of the servant, at a time when apprentices were accustomed to live in the master's house (Graveson, *Status in the Common Law* (London, 1953), 41). But the father has never been liable for his child as such, and Holt owed his inspiration to the law merchant. In his first pronouncement on the subject, *Boson* v. *Sandford* (1691) 2 Salk. 440, the servant was the master of a vessel.

for one reason to be continued for another. Finding a reason *ex post facto* is rationalisation, but there is no harm in this if the reason found is a convincing one and not a mere quietist form of words.

The hollowness of the usual explanations of vicarious liability has often been demonstrated,[24] but this does not prevent them from continuing to be advanced. Going back to Holt's judgments, a favourite quotation is a remark made by that judge with reference to the particular case of deceit. "Somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser, than a stranger."[25] Even if this view is accepted for the case where the servant steals from a stranger, it can hardly explain vicarious liability where the servant defrauds a stranger. For in the case of fraud, the stranger puts his trust and confidence in the servant just as much as the master does. The same is true of many cases of negligence. Besides this, it is not explained why putting trust in a man should create liability for his acts. It is certainly not so as a general principle of law.

Then there is the idea, expressed by Alderson B., that the master is a cause of the mischief, or has set a noxious instrument in motion.[26] In itself this is true. The master is a cause in the factual sense, for if he had not employed the servant to do the particular work the harm would not have happened. The servant might have been doing mischief elsewhere and to some other victim, but he would not have done it then and to this victim. However, it is a very primitive notion that a person must be responsible for harm merely because he is its cause. Causation plus fault is accepted to be enough, but not causation alone. What element in the master-servant situation is there to replace personal fault as an intelligible ground of liability?

Some find it in the fact that the master is benefited by the service, and *qui sentit commodum debet sentire et onus*. This theory was expressed by Lord Brougham,[27] and has made its appearance from time to time since.[28] It may perhaps be supported as a principle

[24] Particularly by Baty, *op. cit.*

[25] *Hern* v. *Nichols* (1701) 1 Salk. 289; quoted by Lord Goddard C.J. in *Broom* v. *Morgan* [1952] 1 Q.B. 597.

[26] *Per* Alderson B. in *Hutchinson* v. *York, Newcastle & Berwick Ry.* (1850) 5 Exch. at 350.

[27] *Duncan* v. *Findlater* (1839) 6 Cl. & F. 894 at 910: "Its reason I take to be this: I am liable for what is done for me and under my orders by the man I employ, for I may turn him off from that employ when I please: and the reason that I am liable is this, that by employing him I set the whole thing in motion; and what he does, being done for my benefit and under my direction, I am responsible for the consequences of it." This rather rambling justification is a common type; it combines a number of items, in the hope that one will sound persuasive.

[28] *e.g.*, Slade J. in *Longdon-Griffiths* v. *Smith* [1950] 2 All E.R. at 667. *Cf.* Denning L.J.: "The reason for the master's liability is not the mere economic reason that the employer usually has money and the servant has not. It is the sound moral reason that the servant is doing the master's

of natural justice, appealing instantly without utilitarian reasoning, in the same way as the principle of liability for fault does. Just as liability for damage can be equitably balanced against the defendant's fault, so it can be equitably balanced against his benefit. This is a principle that one either feels intuitively or does not (like all the rules of natural justice); it is not something that can be argued about. However, the principle as stated is impossibly wide. It explains, and is perhaps the only explanation of, the vicarious liability of partners[29]; but it would at the same time make the landlord of business premises responsible for the firm's torts, at least where the rent varies with the profits (as it may do, without making the landlord a partner); and it would make a passenger in an express train responsible for the negligence of the driver. In a society based on the division of labour we are all constantly receiving benefit from the work of others, but this does not, and cannot, make us legally liable for their wickednesses and mistakes.

Reverting to the case of the master, he sometimes does not receive benefit from the service. A tortfeasant servant may be a disaster to him; but, apart from that, the work on which the master is engaged may not be intended to be profit-making. The courts of some American States are consistent with the benefit theory in deciding that charitable corporations are not vicariously liable; but the trend is away from this opinion,[30] and in England the mere fact that the defendant is a public[31] or charitable corporation has never been enough to exempt. There has, in fact, been a marked tendency of recent years to extend the vicarious liability of non-profit-making organisations, namely the State and hospitals. Again, where an issue arises between a general and a temporary (alleged) master, the benefit theory would presumably result either in the responsibility being divided between them, or in its being placed upon the temporary master who is at the moment enjoying the benefit of the work; but the latest cases tend to deny that the temporary "master" is a master, and to leave the general master saddled with the liability.

Some writers have suggested that vicarious liability is rendered inevitable by the emergence of the joint stock company, for otherwise shareholders would be able to take the benefit of the enterprise without having to bear the damages resulting from torts committed

business, and it is the duty of the master to see that his business is properly and carefully done. . . . The master cannot wash his hands of it by saying, 'I put a competent driver in charge of the lorry.' . . . It is his lorry, and it is his business that it is on. He takes the benefit of the work when it is carefully done, and he must take the liability of it when it is negligently done": *Broom* v. *Morgan* [1953] 1 Q.B. at 608 (C.A.). See also Pollock, *Essays in Jurisprudence and Ethics* (1882) 114.

[29] Conversely it explains, as the "control" test does not, why the foreman is not vicariously liable for the torts of the workman.

[30] See Nona B. Fumerton in (1941) 16 Washington L.Rev. 245, reprinted in 8 *Current Legal Thought*, 399.

[31] *Mersey Docks and Harbour Board* v. *Gibbs* (1866) L.R. 1 H.L. 93.

in the earning of profits.[32] This argument is not entirely true. Quite apart from vicarious liability, the law has now developed the rule that the act or state of mind of the director is to be imputed to the corporation as the corporation's own. Under this doctrine, the shareholders are saddled with the same loss as if the directors were the owners of the business. The "depersonalisation of industry" does not necessitate a doctrine of vicarious liability extending to the acts of inferior servants.

It is worth pausing at this point to say that the fact that a theory does not wholly explain the existing law need not exclude it entirely. Vicarious liability is the creation of many judges who have had different ideas of its justification or social policy, or no idea at all. Some judges may have extended the rule more widely, or confined it more narrowly than its true rationale would allow; yet the rationale, if we can discover it, will remain valid so far as it extends.

The relevance of the *commodum* theory to the question of the master's indemnity against the servant is obvious. If it is a principle of justice that liability should go with benefit, as well as that liability should go with fault, then presumably the loss caused by the servant's unintentional tort should not be borne entirely by the servant but should be shared in some way with the master. As soon as this proposition is put forward its difficulties appear. There is no rational method of apportioning the loss between master and servant, because a judge who attempts to do this is not comparing like with like. One cannot compare the amount of the servant's fault with the amount of the master's benefit. Anyway it is not the tort itself, usually, that benefits the master; it is the whole service of the servant and his fellow-servants. Thus, if there is to be an apportionment between master and servant on this theory, it can only be in some completely arbitrary way.

Alternatively, the master might be refused any contribution against the servant unless the wrongdoing is intentional or (possibly) reckless; in either of the two latter events the master might be given an indemnity. This would solve the difficulty of apportioning. But if the master is refused any contribution where the servant has only been negligent, it should logically follow that the servant if sued should have indemnity against his master. The notion of a negligent servant getting an indemnity from his innocent master is certainly a novel one; but the principle of the Tortfeasors Act is that loss should not necessarily be left where it happens to fall, but should be placed where it ought to fall. The same argument that denies contribution to the master should give an indemnity to the servant.

[32] *e.g.*, Pollock, *op. cit.*, 126–127. *Cf.* Laski in (1916) 26 Yale L.J. 122: "The apprentice no longer marries his master's daughter, for the simple reason that his master no longer has a daughter, or, if he does, that daughter is a corporation who is not given in marriage."

Let us suppose that the *commodum* theory of vicarious liability is rejected—and it is certainly fraught with difficulty. What other theory is there? Well, there is the purely cynical theory that the master is liable because he has a purse worth opening. The master is frequently rich, and he is usually insured—two arguments that might be used by any burglar, if he ever troubled to justify his thefts. The strange thing is to find them put forward by judges of eminence. Lord Lyndhurst L.C. said: "There ought to be a remedy against some person capable of paying damages to those injured,"[33] and this person of course is the master. The sentiment was repeated by Willes J.[34] Whatever (one may ask) can have put this extraordinary idea into judges' heads, that the mere possession of wealth is enough to justify the imposition of legal liability for a wrong? Obviously there is something missing from the dicta. There must be some other fact to create liability, and not merely the attribute of solvency. Perhaps this fact is merely the fact of being a master. If so, we have another unprovable principle of natural justice: that masters ought to pay because they belong to the class of masters. One can manufacture eternal principles of natural justice of this sort without limit.

Why is it desirable that the victim's judgment should not be a barren one? From the victim's point of view it obviously is desirable, and perhaps part of the explanation of vicarious liability is that it results from concentration upon the needs of the injured party. Again, to speak cynically, vicarious liability is very much to the benefit of lawyers. Lawyers, as a class, are among its chief beneficiaries. For if only the servant could be sued, actions for a servant's negligence would be considerably fewer. The master can not only pay the damages: he can pay the costs; and that is a great blessing to the legal profession.

However distasteful the theory may be, we have to admit that vicarious liability owes its explanation, if not its justification, to the search for a solvent defendant. It is commonly felt that when a person is injured (particularly when the injury is a bodily one), he ought to be able to obtain recompense from someone; and if the immediate tortfeasor cannot afford to pay, then he is justified in looking around for the nearest person of substance who can plausibly be identified with the disaster. Where there is no immediate tortfeasor at all, the same sentiment works itself out through rules of strict liability. This attitude of "welfare tort law" is partly fostered by the existing law of vicarious and strict liability; and there is an interaction between opinion and law which may be described either as vicious or as benign according to point of view.

[33] *Viscount Canterbury* v. *Att.-Gen.* (1842) 1 Ph. 306.

[34] *Limpus* v. *L.G.O. Co.* (1862) 1 H. & C. at 539. *Cf.* Pollock and Maitland, 2nd ed., i, 532–533; Carr, *Law of Corporations* (1905), 104. *Contra*, Martin B. in *Williams* v. *Jones* (1865) 3 H. & C. at 263.

The general tendency, at all events, is towards a constant extension of liability without fault. The Crown Proceedings Act, and the Act abolishing the defence of common employment, are two examples of legislation passed as the result of general clamour to abolish restrictions upon vicarious liability.[35] It is true that these Acts can be philosophically justified without the necessity for justifying the general principle. They abolished exceptions to vicarious liability, and whether the general rule is just or not, common opinion regards it as unjust that the rule should be excluded merely because the plaintiff is the defendant's servant or because the defendant is the State itself. Such exceptions smack of class discrimination and State absolutism. Equality is equity, even if it is equality in licensed larceny.

From the point of view of the victim of the wrong, something more than cynical self-interest may lead him to think that the master is responsible. This is the vulgar habit of regarding a group as a unity and tarring all with the same brush. Reparations imposed on a defeated country must be largely paid in fact by a future generation that was innocent of the war; only the notion of the State as a moral unit makes the punishment seem just. In the same way, the tendency of the citizen is to say: "The Post Office has lost my parcel, therefore the Post Office must pay." To a refined conscience, perhaps, this notion of group responsibility may seem primitive. Yet one may argue that it is no less logical than the attribution of responsibility to the individual. The unity of the individual, just as much as that of the group, is the result of abstraction. There are, of course, elements of continuity in the individual, but so there are elements of change. There is no compelling reason why we should punish a man of seventy for what he did as a boy of seventeen; in an important sense he is, at seventy, a different person. If we punish him for his past sins, it is because we choose to apply the fiction of unity regardless of change. No ultimate justification for this fiction is possible, save that the notion of responsibility is socially necessary and it is perhaps difficult or undesirable to draw a temporal line. Once it is recognised that the moral responsibility of the individual involves a fiction—or, if the expression be preferred, a subjective attitude—it becomes

[35] So also vicarious liability was extended by the Pilotage Act, 1913, (passed in pursuance of the Convention of 1910) to compulsory pilotage Aircraft owners were placed under strict and vicarious liability by the Act of 1920, now the Civil Aviation Act, 1949, s. 40. Bus companies were forbidden to contract out of liability for negligence by the Road Traffic Act, 1930, s. 97; and the Law Reform (Personal Injuries) Act, 1948, s. 1 (3), prevented employers from reintroducing the defence of common employment by express contract with their servants. In addition, the tendency of judicial decision has constantly been to widen vicarious liability, *e.g.*, in respect of intentional torts and by way of narrowing the conception of "frolic of his own," as well as by extending this liability from servants to independent contractors in many situations. On the other hand, the shipowner's statutory action for limitation of liability shows some tendency to save the employer from crippling loss.

easier to accept the moral responsibility of the group on a similar basis.

There can be no doubt that the notion of group unity is a powerful reason for the general acceptance of vicarious liability. Yet it must be said that group responsibility is very much a matter of point of view. Although it is tempting for us to identify foreigners with their government, we should not like to be held responsible for the faults of our own. A person who is landed with responsibility for the sins of his fathers or compatriots, or for the flight of his son beyond the Iron Curtain, is likely to feel a sense of grievance. Man's progress has been associated with increasing emphasis upon the value of the individual, and collective punishment tends to deny this value. On the whole, the notion of group unity does not offer a satisfactory philosophy of vicarious liability, even where nothing worse is inflicted on the group than the liability to pay a sum of money.

The sentiment in favour of group responsibility becomes immensely reinforced when the member of the group who actually committed the wrong is difficult to ascertain. If it were not for vicarious liability, it might be hard to enlist the master's co-operation in discovering which of his servants committed the tort, and in what circumstances. However, this does not wholly explain vicarious liability, for the point could be met by compelling the master to answer interrogatories as to the identity of the wrong-doing servant.

Group responsibility is also favoured by the existence of contractual liability. If, for example, a master contracts to carry the plaintiff's goods, he impliedly contracts to take due care in their carriage; and since he intends to employ servants to do the actual carrying, it is a reasonable construction of the contract that he warrants the carefulness of his servants. When the master is thus vicariously liable in contract, it is soon felt to be anomalous if he is not also vicariously liable in tort, where the particular plaintiff has no contract with him.[36] Pollock in his young days was prepared to accept Holmes's theory that vicarious liability in tort was merely a survival,[37] but by 1916 he had come to support it on the ground that the most certain result of abolishing it would be a huge expansion of fictitious contracts, to no great advantage of the law.[38] It must be said, however, that in many circumstances now covered by vicarious liability it would not be possible to construe a contract.

The reader may well think, after this survey of the more metaphysical justifications of vicarious liability, that none of them is

[36] Thus in the first of Holt C.J.'s decisions on vicarious liability cited by Holdsworth, *Bosun* v. *Sandford* (1691) 2 Salk. 440, there was a relation of contract between the parties; but the principle was very soon extended, in *Tuberville* v. *Stamp* (1698) Comb. 459, to a case where the plaintiff was a stranger.

[37] *Pollock-Holmes Letters*, i, 7 (1877).

[38] *Ibid.*, 233.

a sufficient reason for maintaining this department of law. There remain other justifications based upon " public policy " and " social necessity " which are better able to withstand critical enquiry. They will be considered in a succeeding article, which will also discuss the bearing of these pragmatic theories upon the problem of indemnity.

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THE CONDITION AS TO TITLE IN SALE OF GOODS

The object of this article is to endeavour to ascertain how far the provisions of section 12 (1) of the Sale of Goods Act, 1893, can be excluded by agreement, express or implied, to the contrary effect. It will be recalled that the relevant provisions run thus—

> "In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is:
> (1) An implied condition on the part of the seller that, in the case of a sale, he has a right to sell the goods, and that, in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass."

This wording would seem to leave no doubt that it is open to a seller to protect himself from any liability likely to arise from a breach of the term contained in this subsection by an agreement, express or implied, to the contrary effect. Nevertheless, there appears to be some reluctance amongst certain textbook writers to accept such a conclusion.

A convenient starting-point seems to be the discussion of this problem in Cheshire and Fifoot's *Law of Contract*, 4th ed., p. 137. Whilst admitting that, according to the wording of section 12, it would appear to be allowed to a seller to contract out of the condition otherwise implied by section 12 (1), the learned authors go on to say—

> ". . . it is difficult to believe that a seller, who avails himself of this indulgence, will escape liability if he delivers to the buyer goods which belong to a third party. He would still be caught by the terms of section 1 (1) of the Act, which defines a contract for the sale of goods as 'a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price.' If, in purported pursuance of his contract, he delivers goods which, though he is ignorant of the fact, are owned by someone else, he does not and cannot transfer the property in them. There is a complete failure of consideration, and no excluding words, however comprehensive, will excuse him." [1]

To this contention, it is respectfully submitted, three objections may be urged. First, the case which appears to be cited in its support, *Rowland* v. *Divall*,[2] is not adequate authority since the question of excluding section 12 (1) by initial agreement to the

[1] Sutton and Shannon on *Contracts*, 5th ed., pp. 307–308 and n. (*g*), p. 307, appears to take the same view.

[2] [1923] 2 K.B. 500.

contrary effect was not raised. Secondly, there appears to be no ineluctable reason of principle to debar a seller from excluding section 12 (1) and, provided that the surrounding circumstances or words used are apt for that purpose, then there will be neither failure of consideration nor conflict with section 1 (1). Thirdly, the argument seems to run contrary to a fairly considerable body of authority and textbook opinion to the opposite effect.

Taking these objections in order, it will be recalled that the facts of *Rowland* v. *Divall* were that the plaintiff bought a car from the defendant and resold it. Some months later it transpired that the car was the property of a fourth party to whom it was surrendered. The plaintiff then sued the defendant to recover the purchase price. At no stage in the original transaction was there any express agreement excluding section 12, nor were there any circumstances from which such an agreement could be implied. It was, however, argued for the defendant that the plaintiff's case was based upon the condition implied by section 12 (1), and that since the plaintiff and his sub-purchaser had been in possession of the car for some months the breach had to be treated as a breach of warranty in accordance with section 11 (1) (*c*) and thus, though damages might be recovered for actual loss, the contract was not discharged and the full price could not be recovered back. The defendant's argument was rejected by Atkin L.J. in words cited by Cheshire and Fifoot which could be paralleled by similar passages from the judgments of the other members of the court, Bankes and Scrutton L.JJ. Atkin L.J. said—

> "... there can be no sale at all of goods which the seller has no right to sell. The whole object of a sale is to transfer property from one person to another. ... In fact the buyer has not received any part of that which he contracted to receive—namely, the property and right to possession, and, that being so, there has been a total failure of consideration."

This passage admittedly carries Cheshire and Fifoot's point that breach of section 12 (1) will amount to failure of consideration, but it does not necessarily follow from that proposition that a person purporting to sell goods may not so arrange his transaction as to avoid any breach of section 12 (1) if he delivers goods which he has no right to sell and, it is submitted, there is nothing in *Rowland* v. *Divall* to render such a result impossible of achievement. Bankes L.J. cited section 12, including the initial exception relating to circumstances showing a different intention, without in any way indicating that he considered the exception to be a "*brutum fulmen*." [3] Nor did Scrutton L.J. in his brief survey of the law as to undertakings for title both before and after the Act, seem to be of the opinion that those circumstances he mentioned

[3] At p. 502.

which, prior to the Act, would have negatived an undertaking as to title could not have the same effect after the Act.[4]

That it was completely unnecessary for the court in *Rowland* v. *Divall* to go into the question of circumstances showing an intent to negative section 12 (1) can be seen from three short extracts from the judgment of Atkin L.J.

> "In fact the buyer has not received any part of that which he contracted to receive—namely, the property and right to possession." [5] "He (the buyer) paid the money in order that he might get the property, and he has not got it." [6] "The buyer accepted the car on the representation of the seller that he had a right to sell it. . . ." [7]

Neither Atkin L.J. nor the other members of the court were concerned to discuss the situation had the parties entered into a contract less absolute than that indicated in the first two of these extracts, or if no such representation as that indicated in the third had been made.

But perhaps the most serious flaw in *Rowland* v. *Divall*, if regarded as a support for the non-exclusionary view, occurs in the judgment of Scrutton L.J. Having said that if there is a breach of the term as to title the buyer can demand a return of the purchase price, he continues: "unless he has, with knowledge of the facts, held on to the bargain so as to waive the condition." [8] Thus Scrutton L.J. clearly contemplated that an implied term as to good right to sell could be negatived by the buyer's agreement subsequently to the making of the contract. If the implied term as to title can be excluded after the contract has been made, it should be equally possible to exclude it at the time of making the contract.

The second objection entered against the non-exclusionary view is that it does not appear to be well grounded in principle. Leaving the Act aside, there seems to be no reason of law or logic why a person who is purporting to sell goods to another should not be entitled to declare to that other, either by words or conduct: "If you choose to buy the article, it is at your own peril." [9]

At this point it may be appropriate to counter support for the non-exclusionary view based on the developing doctrine of the

[4] It may be noted that a court of exactly the same composition as that in *Rowland* v. *Divall* had considered s. 12 (1) and its initial exception two years earlier in *Niblett* v. *Confectioners' Materials* [1921] 3 K.B. 387. All, especially Atkin L.J. at p. 401, seemed to be of the opinion that s. 12 (1) could be excluded.

[5] At p. 507.

[6] At p. 506.

[7] At p. 507.

[8] At p. 505.

[9] See the example put by Erle C.J. in *Eichholz* v. *Bannister* (1864) 17 C.B.(N.S.) 708 at 722 from which the declaration quoted is taken.

fundamental term or fundamental breach.[10] Against any such contention, it is submitted, two points may be urged. First, the opening words of section 12 expressly say that the terms as to title may be excluded, and this is tantamount to a declaration that they are not to belong to the fundamental unexcludable core.[11]

Secondly, Mr. Melville, at any rate, is prepared to admit that the core concept is not to operate when it is clearly shown that a contracting party is purchasing a chance,[12] a situation which does not seem to have been considered in the recent authorities on the fundamental term. This suggests that perhaps the most satisfactory way of excluding section 12 (1) would be to reduce the contract to an "emptio spei"—the purchase of a chance.

Halsbury says—

> "Where the parties clearly intend it, there may be an 'emptio spei,' that is to say, the sale and purchase of the chance of obtaining goods, rather than of the goods themselves. Such a contract is contingent on the part of the seller, but absolute on the part of the buyer." [13]

It will be noted that among the authorities cited for this passage is *Bagueley* v. *Hawley*,[14] an old authority upon the exclusion of a term as to title. This, it is submitted, shows that in the opinion of the writer the chance concept is operative not only in respect of the physical existence of goods but also in respect of the title to them.

Benjamin also admits of the existence of sales of chances in much the same terms as those used by Halsbury.[15]

In so far as the non-exclusionary contention depends upon failure of consideration when a seller delivers goods not his own, it is submitted that it breaks down by reason of the fact that when section 12 (1) is aptly excluded there is no failure of consideration when such goods are delivered. This point was expressly dealt with in the briefly reported judgment of Patteson J. in *Chapman* v. *Speller*.[16] As in so many of the pre-1893 cases on negation of an implied term as to title, the excluding circumstances resulted from the fact that the main transaction arose out of a sheriff's sale, at

10 See "The Core of a Contract," L. W. Melville, (1956) 19 M.L.R. 26. Sutton and Shannon on *Contracts*, 5th ed., Art. 107, pp. 304–309. *Karsales* v. *Wallis* [1956] 1 W.L.R. 936.

11 Assuming that the term as to title is fundamental in character on common law principles, might it be suggested that the result of the opening words of s. 12, when a "different intention" is shown, is to produce a situation akin to that averted to by Wynn-Parry J. in *Rajbenback* v. *Mamon* [1955] 1 Q.B. 283 when he remarked that statute might deprive an agreement of an element, mutuality, essential to an ordinary contract and yet leave it effective as a contract.

12 (1956) 19 M.L.R. at p. 27.

13 Halsbury's *Laws of England*, Hailsham ed., Vol. 29, p. 48, para. 53 and note (*q*).

14 (1867) L.R. 2 C.P. 625.

15 Benjamin on *Sale*, 8th ed., p. 129.

16 (1850) 14 Q.B. 621 cited in *Bagueley* v. *Hawley* at p. 629 *per* Montague Smith J.

which, it was well settled,[17] no implied term as to title was ever given. The facts of this case were that the defendant, at a sheriff's sale under a writ of fi. fa., bought goods from the sheriff for £18, and the plaintiff, who was also present at the sale, gave the defendant £23 "to stand in his shoes," taking over his bargain. The defendant paid over £18 to the sheriff who began delivering the goods to the plaintiff, but they were then claimed by their true owner. Held, that in the circumstances, the defendant could not be supposed impliedly to warrant his title, and hence there was no operative implied term as to title. The learned judge also held that there was no failure of consideration.

> "The true consideration was the assignment of the right, whatever it was, that the defendant had acquired by his purchase at the sheriff's sale; and this consideration has not failed."[18]

On this reasoning a seller who has effectively excluded section 12 (1) will not be in default if he delivers goods not his own, and there will be no failure of consideration.[19]

The Cheshire and Fifoot argument would also seem to depend upon the proposition that the initial exception to section 12 is repugnant to section 1 (1). This seems to follow from their statement that a person who sought to take advantage of it "would still be caught by section 1 (1) of the Act," as a result of the definition of a sale contained in the latter section.[20] To this, it is submitted, two replies can be advanced. First, admitting that a transaction in which the seller has excluded section 12 (1) is, perhaps, not a sale but a transaction *sui generis*, it may nonetheless be effective according to its terms. Contracts of barter and for work and labour or work and materials have many features in common with contracts of sale but do not square with the definition in section 1 (1). This is not fatal to their efficacy and neither more should it be fatal to the efficacy of "emptiones spei."

The second line of reply depends upon general principles of statutory interpretation. Even if there is a prima facie repugnancy between two sections of a statute the court strives, in so far as it is able, to effect a reconciliation. This may be done by construing the

[17] See authorities collected in Halsbury's *Laws of England* (Hailsham ed.), Vol. 29, p. 58, note (*s*). The sheriff only warrants that he does not actually know that he has no title to sell. *Peto* v. *Blades* (1814) 5 Taunt. 657 and also that he is acting within his jurisdiction. *Dorab Ally Khan* v. *Abdool Azeez* (1878) L.R. 5 Ind.App. 116.

[18] (1850) 14 Q.B. at 624.

[19] The attempted use by Cheshire and Fifoot of the "peas and beans" example put by Lord Abinger in *Chanter* v. *Hopkins* (1838) 4 M. & W. 399 at 404 in support of the non-exclusionary argument is, it is suggested with respect, misconceived. The Chief Baron was not concerned to discuss the situation which arises when the buyer merely purchases a chance of obtaining the property in peas.

[20] The definition is as follows: "A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price."

narrower provision as creating an exception to the wider.[21] By this route, too, it would be possible to save contractual terms designed to exclude section 12 (1) from being captured by section 1 (1). This approach might be reinforced by the presumption against changing the pre-existing law, since it is clear that prior to the Act it was possible to exclude a term as to title.[22] From the wording of the initial exception Parliament clearly seems to have desired to preserve the possibility of exclusion. When presumptions appear to concur with the express intention of the legislature in so striking a fashion, it is suggested that it would be a bold court that would resist their combined pressures.

The third objection to the non-exclusionary view is that it runs counter to the weight of what authority and textbook opinion there is, though the problem nowhere seems to have earned very full treatment except, perhaps, in Benjamin.

Scrutton L.J. conveniently summarises the result of the cases prior to 1893 as follows in *Rowland* v. *Divall* [23]:

> ". . . there was a good deal of confusion in the authorities as to the exact nature of the vendor's contract with respect to his title to sell. It was originally said that a vendor did not warrant his title. But gradually a number of exceptions crept in, till at last the exceptions became the rule, the rule being that the vendor warranted that he had title to what he purported to sell, except in certain special cases, such as that of a sale by a sheriff, who does not so warrant."

The only comment to be made upon this survey of the historical position is that though all the pre-1893 cases in which a warranty was negatived, after the presence of a warranty was generally recognised, arose from sheriffs' sales or similar transactions, in no case did the court limit the possibility of excluding the warranty to such sales alone. In particular, a general possibility of exclusion seems to have been recognised by Erle C.J. in *Eichholz* v. *Bannister*.[24]

Passing to modern cases and opinion, Chalmers on *Sale of Goods*, 12th ed. (1945) at p. 52, makes brief reference to the fact that implied undertakings as to title have been held to be negatived in cases arising out of sales by sheriffs or forced sales by public auction. The few cases cited [25] are all prior to the Act, but nothing is said to indicate that the Act is thought to have changed the law by removing the possibility of exclusion, or to indicate that exclusion is confined to the types of sales mentioned.

[21] *Churchill* v. *Crease* (1828) 5 Bing. 177 at 180 *per* Best C.J. *Pretty* v. *Solly* (1859) 26 Beav. 606 at 610 and *De Winton* v. *Brecon* (1859) 28 L.J.Ch. 598 at 604 *per* Romilly M.R.

[22] See Scrutton L.J. in *Rowland* v. *Divall* at p. 505 and authorities collected in Halsbury's *Laws of England* (Hailsham ed.), Vol. 29, p. 58, n. (*s*).

[23] [1923] 2 K.B. at 505.

[24] (1864) 17 C.B.(N.S.) at 722.

[25] *Ex p. Villars* (1874) L.R. 9 Ch.App. 434 at 437; *Peto* v. *Blades* (1814) 5 Taunt. 657; *Dorab Ally Khan* v. *Abdool Azeez* (1878) L.R. 5 Ind.App. 116.

Schmitthoff on *Sale of Goods* (1951) appears to ignore the question, though in a chapter on sale of goods contributed to Chitty on *Contracts*, 21st ed. (1955) by Dr. Schmitthoff,[26] the case of *Payne* v. *Elsden*[27] is cited as authority for the possibility of excluding the term implied by section 12 (1). The facts of this case were that the defendant, an auctioneer, sold to the plaintiff a piano by auction under a distress warrant for rent. The warrant proved to be invalid and the true owner recovered the piano from the buyer, who took proceedings against the auctioneer for damages. It was held that having regard to the circumstances in which the sale took place any implied term as to title was negatived. The report clearly shows that Ridley J. was untroubled by any doubts about the possibility of excluding section 12. The report reads—

> "As to section 12 of the Sale of Goods Act, after reading that section he came to the conclusion that the circumstances of the contract in the present case showed a different intention as provided for in that section. It was hard for both parties in the present case since they were equally innocent, and neither had known that the piano was not properly sold, but he held that the circumstances of the contract showed no implied warranty of title to the goods."[28]

Halsbury's *Laws of England* (Hailsham ed.) (1938) cites the words of the initial exception to section 12 without remark,[29] but a little further on appears to admit the possibility of exclusion by remarking that many of the pre-1893 cases where no warranty of title was found "may still be relevant to the words in the initial exception, *viz.*, 'a different intention.'"[30] *Payne* v. *Elsden*[31] is also cited.

Benjamin on *Sale*, 8th ed. (1950), however, takes up a frankly exclusionary position,[32] adopting a dictum of Atkin L.J. in *Niblett* v. *Confectioners' Materials*.[33] He said—

> "I think those words ('unless the circumstances of the contract are such as to show a different intention') were inserted in section 12 of the Sale of Goods Act to exclude sales by a sheriff under an execution and other cases where by implication or by express terms there is no warranty of title."

The learned Lord Justice could hardly have stated more clearly the view that section 12 (1) could be effectively excluded. Furthermore, in sheriff sales no liability attached to the seller without title, either on a warranty or for failure of consideration, and by putting "other cases where by implication or express terms there is no warranty of title" on the same footing with sheriff sales, the Lord Justice would appear to commit himself to the view that similar rules apply to these "other cases."

[26] Chitty on *Contracts*, 21st ed., Vol. 2, p. 625.
[27] (1900) 17 T.L.R. 161.
[28] (1900) 17 T.L.R. at 161–162.
[29] Vol. 29, at p. 57.
[30] *Ibid.*, at p. 58, n. (*s*).
[31] *Ibid.*
[32] Benjamin, p. 604.
[33] [1921] 3 K.B. 387 at 401.

The facts of *Niblett's* case were that the seller delivered goods, tins of preserved milk labelled "Nissly Brand." This label constituted an infringement of the trade mark of a third party who could, therefore, restrain the sale of the goods, and the court held that the seller was in breach of the implied condition that he had a good right to sell. The defendants sought to pray in aid the initial exception to section 12, alleging that the contract was partly oral, and that one of its terms was that they might deliver milk of several different brands, one of which was the infringing brand, and contended that this was a circumstance showing a different intention which negatived the implied terms in section 12. It was held by the court that, assuming that the term in question was part of the contract, it was not such a circumstance as could have that effect.

In dealing with this point the other two members of the court, Bankes and Scrutton L.JJ., did not express themselves as plainly as Atkin L.J. upon the possibility of negativing the implied term, but their judgments clearly appear to assume that possibility, provided that the circumstances did show the different intention. Thus Bankes L.J. declined to express an opinion upon what would be "circumstances showing a different intention," merely deciding that none were present in the instant case.[34] He did not say that no circumstances would ever be effective to save the seller. Scrutton L.J. admitted that the implied term might be excluded in saying that he desired to reserve his opinion on the presence of an implied term if the contract had merely been to sell 1,000 cases of "Nissly" brand milk, and there had not been an option of delivering other brands.[35]

Though there appears to be no case on the books which clearly holds that excluding words will save a seller from liability for delivering goods not his own in pursuance of some ordinary business transaction which is not a sheriff's or forced sale, it is submitted, with all respect for those who hold a contrary view, that the clear deduction from the authorities is that such an escape is possible. The words of section 12 plainly appear to allow it. If the excluding words relied upon were sufficiently comprehensive there could not be "circumstances" which could more clearly show "a different intention," and in such a case, if the "seller" had no right to dispose of the goods, *Bagueley* v. *Hawley*,[36] and *Chapman* v. *Speller*,[37] are sufficient authority for the proposition that there would be no failure of consideration if the transaction was the sale of a chance because the "purchaser" could not claim to be disappointed, legally speaking, in his expectations. Alternatively, it might be said that, provided he was given the chance for which he bargained, the fundamental contractual obligation had been fulfilled.

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[34] [1921] 3 K.B. at 395.
[35] *Ibid.*, at 398.
[36] (1867) L.R. 2 C.P. 625.
[37] (1850) 14 Q.B. 621.

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THE JUDICIAL ASCERTAINMENT OF CUSTOMARY LAW IN BRITISH AFRICA

Introductory

The ascertainment of usage or custom which is to be administered by the courts presents problems in England; how much greater is the problem when the way of life, and even the language, of the people concerned are entirely alien to the judges and magistrates administering the customary law! This is the case in British Africa, where still—to a large extent—the personnel both of the superior courts [1] and of the subordinate courts other than native courts [2] is British. It is natural that in the course of time the individual judge, magistrate, or administrative officer should acquire a certain knowledge of the political and social systems, and the customary law which expresses those systems, of the indigenous African population; but this knowledge is unlikely to be deep (through transfers of the officers between territories or postings within them); and the officer is often legally debarred from expressly drawing on his own knowledge in the decision of cases involving customary law. It is necessary to fall back on other means of discovering what are the rules of customary law on any particular topic. A consideration of what means are open to parties or courts is therefore of central importance to the present-day administration of justice in Africa; there appears to have been no previous attempt, other than a valuable paper by Mr. J. Lewin, to collate the available statute and case law on the subject.[3] This paper endeavours to remedy the omission.

The difficulty experienced by a court in finding out, and then applying, the customary law applicable to a case before it flows partly from the multiplicity of different tribal laws (varying widely from tribe to tribe), partly from the uncertainty regarding the limits of the operation of customary law in competition or conflict with English or, where prevalent, Islamic law, and partly from the fluid nature of customary law itself. The rules of customary law were, in the past, generally not as certain as the courts would now like them to be; the object of many customary

[1] *Viz.*, the regional courts of appeal (for East and West Africa); the Supreme or High Courts of the different territories.

[2] Constituted by professional magistrates (District or Resident Magistrates), or by administrative officers in their magisterial capacity.

[3] See J. Lewin, "The Recognition of Native Law and Custom in British Africa," (1938) 20 J.Comp.Leg. (3rd ser.) 16; see also a note on "Methods of Recording Native Customary Law," (1950) 1 J.African Admin. 130; and (for the Punjab) Rattigan, *Digest of Civil Law for the Punjab, etc.* (13th ed.), 1953, 148 *et seq.*

legal proceedings was negotiation leading to compromise and reconciliation of the parties, rather than the rigid application of rules to facts. The "rules" of customary law—*e.g.*, that a wound should be compensated by the payment of so many cattle—often only set a standard or provided a talking point. The modern customary law is generally more rigid, through its administration by British courts or by native courts influenced by English legal ideas; but the rapid change in social and economic life—cash crops, labour at a wage, education—induces a corresponding fluctuation in customary law, which renders out of date many past findings on its rules. A study of judicial decisions shows that the diversity and flexibility of customary law have sometimes been overlooked by the British courts.

The primary law of the British courts is "English law."[4] This inexact phrase covers two types of law: the law of England as at the date of the constitution of the territory in question (*i.e.*, the rules of common law, the doctrines of equity, and statutes of general application), and colonial legislation, whether by ordinance, proclamation, order, or otherwise, made after that date. But exceptionally, in cases to which the parties are "natives" or "Africans," the courts are to "observe" or "be guided by" the rules of native customary law. Native customary law, however, is only applied subject to certain conditions:—

(1) It must be applicable; *i.e.*, the transaction must be one known to customary law, and there must be rules of the particular customary law available for the decision of the dispute.

(2) It must not be repugnant to natural justice, equity, or good conscience. This requirement extends as much to the adjectival as to the substantive law, but in practice it is interpreted liberally.

(3) It must not be incompatible with any legislation for the time being in force in the territory. Customary law may be expressly overridden by statute law (as where customary criminal law is replaced by a penal code); or it may be in principle in conflict with it, and thus impliedly inapplicable.[5]

In many of the British African territories Islamic law is also applied to a greater or less degree, either expressly by statute, or in the guise of native customary law.[6]

A further general difficulty faced by the courts is that of discriminating between custom having the force of law, and that which lacks that force though perhaps having a moral or religious sanction. Although some of the ordinances provide for the administration of "native law and custom," others for "native law," and yet others for "native customary law," it is submitted that

[4] Except in the High Commission Territories.

[5] For which see my "The Extent of the Operation of Native Customary Law: Applicability and Repugnancy," (1950) 2 J.African Admin. 4, and references therein.

[6] For which see J. N. D. Anderson, *Islamic Law in Africa*, 1954.

the verbal variations are legally insignificant,[7] that a court may only administer customary law, though it may incidentally have regard to custom not having the force of law, *e.g.*, for weighing evidence, for deciding what constitutes provocation, and in assessing what punishment is suitable.

Native Customary Law as a Question of Fact

That, in England, any local custom at variance with the law of the land should be proved by the party alleging it is fair and reasonable; and similar considerations might seem relevant in Africa, since customary law derogates from the general law as applied by the courts. It is true that customary law is in a sense local or personal, since it attaches to a given tribe or the members of that tribe, or to the area within which they are dominant. Nevertheless, as far as the Africans who are members of that tribe are concerned, their customary law is not an occasional variant from the general law applicable to them; it is their general law prima facie applicable in civil and criminal matters. The tests for its application, and the method by which its rules are ascertained, should not be blindly borrowed from the English law relating to local custom. After a period of uncertainty, colonial courts have recognised as much; *e.g.*, the English test of antiquity (that a custom should date from A.D. 1189), which was applied to African customary law in the early Gold Coast case of *Welbeck* v. *Brown*,[8] has since been impliedly abandoned.[9]

If the analogy is not to be made with local custom in England, with what is it to be made? The answer given by some colonial courts is, with foreign law: "As native law is foreign law, it must be proved as any other fact."[10] This dictum of Francis Smith J. overstates the case; customary law is not foreign law, though its rules may be unknown to the judges who have to apply them; nor is the proof of customary law identical with that of other facts. The analogy has, however, a certain force; one may compare the rules that customary law must be specially pleaded by the party alleging or relying on it; that it must be proved by witnesses; that the effect of their evidence is for the judge and not the jury. But the analogy is not complete: there are other methods of ascertaining customary law; and the operation of the second branch of the rule in *Angu* v. *Atta*[11] may take a particular rule of customary law out of the realm of fact, and into the realm of law, of which judicial notice will be taken.

[7] *Cf. Ayoola & ors.* v. *Folawiya & ors.* (1942) 8 W.A.C.A. 39 (Nigeria), on the construction of "Mohammedan Law or Custom."

[8] (1882) Sarbah F.C.L. 185 (Gold Coast).

[9] See *Mensah* v. *Wiaboe* (1925) D.Ct. 1921–1925, 172 (Gold Coast).

[10] *Hughes* v. *Davies* (1909) Renner 550, at 551 (Gold Coast).

[11] (1916) Gold Coast Privy Council Judgments, 1874–1928, 43, 44 (P.C.): "particular customs" may "by frequent proof in the courts, become so notorious that the courts will take judicial notice of them."

Native Customary Law to be Specially Pleaded

Whilst there does not appear to be express legislation on the point in every territory, customary law, if relied on by a party to a civil case, must usually be specially pleaded. This was laid down in the Gold Coast case (in the West African Court of Appeal) of *Bonsi* v. *Adjena* [12]; but the practice has been specifically provided for in the new Gold Coast [12a] Supreme Court Rules, modelled on the English Supreme Court Rules, which say [13]:

> "In all cases in which the party pleading relies upon a native law or custom, the native law or custom relied upon shall be stated in the pleading with sufficient particulars to show the nature and effect of the native law or custom in question and the geographical area and the tribe or tribes to which it relates."

This admirable provision [14]—which might be copied elsewhere with advantage—may go far to rectify the rather loose way in which, in the past, customary law has been applied, without a sufficient realisation that it may radically vary from tribe to tribe, and that a book or dictum on, say, Fante law is of little or no value for the decision of a case on Ewe law.

Native Customary Law to be Proved by Witnesses; the Rule in Angu v. *Atta* [15]

Their Lordships of the Privy Council laid it down in this Gold Coast case that—

> "As is the case with all customary law, it has to be proved in the first instance by calling witnesses acquainted with the native customs until the particular customs have, by frequent proof in the courts, become so notorious that the courts will take judicial notice of them." [16]

This dictum was approved in the later Gold Coast case of *Amissah* v. *Krabah* [17]; it has, in addition, been widely followed in other territories.[18]

[12] (1940) 6 W.A.C.A. 241.

[12a] To avoid confusion, "Gold Coast" is used throughout this paper to include "Ghana," where appropriate.

[13] Supreme Court (Civil Procedure) Rules, Ord. 19, r. 31; made under s. 107 of the Courts Ordinance, c. 4, Laws of the Gold Coast, 1951 Revision.

[14] But it is inapplicable to trials without written pleadings, as many civil proceedings by illiterate parties unassisted by counsel before the subordinate courts may be.

[15] (1916) Gold Coast Privy Council Judgments, 1874–1928, 43.

[16] At p. 44.

[17] (1936) 2 W.A.C.A. 30, at p. 31 (P.C.).

[18] Uganda: see *Kigizi* v. *Lukiko of Buganda* (1943) 6 Ug.L.R. 113, at p. 117, and the Evidence Ordinance, c. 9, s. 46.

Sierra Leone: see *Macauley* v. *Bungay* (*No. 1*) (1930) 2 S.L. Law Recorder 28 (W.A.C.A.).

Nigeria: the Evidence Ordinance, c. 63, s. 14, adopts the principles of the rule in *Angu* v. *Atta*; and see also ss. 56 (1) and 58.

Nyasaland: see *Mwase and the Blackman's Church of God which is in*

Who are eligible witnesses to native law and custom? It is generally assumed that the witnesses must be "expert"; and that they should be native Africans. Neither of these requirements are, it is submitted, essential (except where required by ordinance).[19] There are two ways in which the existence of a custom may be proved; by the testimony of witnesses able to testify to actual occasions in the past when such-and-such was done (*i.e.*, they are witnesses of fact); and by the opinions of those with peculiar or special knowledge of the customary law, who state what, in their opinion, the customary law on such-and-such a topic is (they may, of course, at the same time give specific instances of occasions when the custom they allege has been followed). The former course is normally unduly laborious, so that the production of expert witnesses is preferred; but there are occasions when actual events must be investigated (as where there is a dispute about the procedure for the deposition of a chief).

Once one has discarded possible misrepresentation of the law due to the ignorance, bias, or corruption of witnesses, there may be other causes for a variation between the actual customary law and the law as presented by expert witnesses. Two of these are a tendency to idealise the law, to present what it ought to be instead of what it is; and a failure to appreciate that the ancient, traditional law has been modified by subsequent practice, by native court decisions, or by the influence of English ideas.

Although there does not appear to be express provision on the point in most territories, it is submitted, as a matter of principle, that the effect of evidence given as to the existence of a custom is for the judge, and not for a jury or for assessors when sitting with him (though assessors may be required to give their opinion on the testimony).[20] This is by way of analogy with the proof of foreign law in English courts, though not with that of local custom.

The second branch of the rule in *Angu* v. *Atta* lays down that a particular custom may become so notorious by frequent proof in the courts that the courts will take judicial notice of it; this aspect of the law is considered later under the heading of "Judicial Notice."[21]

Tongaland v. *Church of Central Africa, Sanga Division* (1935) 4 Ny.L.R. 45, and *Mwale* v. *Kaliu* (1950) 6 Ny.L.R. 169, at p. 171.

Northern Rhodesia: see *R.* v. *Mporokoso* (1939) N.R.L.R. 1938–1942, 152, at p. 154.

For East Africa generally, *cf. Ndembera* v. *R.* (1947) 14 E.A.C.A. 85; and see also the Indian Evidence Act, 1872, ss. 45 and 48; the I.E.A. is in force in Kenya, Tanganyika and British Somaliland.

[19] *Cf.* the mention, in *Angu* v. *Atta*, of "witnesses acquainted with native customs," and the wording, *e.g.*, of the Uganda Evidence Ordinance, s. 46, and of the Northern Rhodesia High Court Ordinance, s. 63.

[20] *Cf.* the Nigerian Supreme Court Ordinance, s. 19, and Sierra Leone Courts Ordinance, s. 18.

[21] See pp. 258 *et seq.*

The function of assessors

The law of most territories [22] provides that British courts may summon to their aid chiefs or other persons expert in the customary law to advise them as assessors, *inter alia*, on customary law. This power may extend to civil matters, to criminal proceedings, or to both. Almost universally a judge is empowered to sit with assessors in criminal matters.

The idea of appointing assessors, by whatever name called, to sit with a judge and advise him on questions of fact and custom, was taken from the law of British India.[23] An Indian judge, Bhashyam Ayyangar J., in a Madras case, *King Emperor* v. *Tirumal Reddi*,[24] stated what in his view the functions of an assessor are. He said—

> ". . . assessors are analogous to expert witnesses and in principle the opinion of an assessor is substantially on the same footing as the opinion evidence of expert witnesses. . . . Thus it will be seen that provision was made by the legislature for Europeans administering justice in a foreign land and therefore deficient in their knowledge of the customs and habits of the parties and witnesses appearing before them, and also deficient in judging of their demeanour in the witness-box, having the benefit of the opinion of two or more respectable natives of the land as assessors possessing such knowledge and judgment . . . the opinion of an assessor given upon the whole case tried before a Court of Session or any portion of such case is, in principle, on the same footing as the opinion evidence of a person specially skilled in foreign law, science or art."

These observations were cited and approved by the Court of Appeal for Eastern Africa in a criminal appeal from Kenya, *R.* v. *Mutwiwa*.[25] The question for decision was whether a judge was entitled to take into consideration the opinion, unsupported by evidence, of one of the assessors in regard to the existence of a certain type of native oath. The court answered in the affirmative; but this finding is suspect in the light of the later decision of the Court of Appeal for Eastern Africa in a criminal appeal from Tanganyika, *Ndembera* v. *R.*[26] Accused had killed deceased whilst the latter was arresting him; and the question at issue was whether this arrest was justified by native law and custom (and thus the killing murder), or not. The trial judge held that the arrest was lawful by native law and custom. On this the Appeal Court commented—

22 *Cf.* Sierra Leone Courts Ordinance, s. 18; Gold Coast Courts Ordinance, s. 87 (2); Uganda Civil Procedure Code, s. 91 (1); Kenya Civil Procedure Code, s. 87 (1), Criminal Procedure Code, s. 258. Tanganyika and Northern Rhodesia have similar provisions, and see also Tanganyika Subordinate Courts Ordinance, s. 11, and Local Courts Ordinance, s. 38 (4) (*a*).

23 But India only had assessors in criminal cases.

24 (1901) I.L.R. 24 Mad. 523.

25 (1935) 2 E.A.C.A. 66.

26 (1947) 14 E.A.C.A. 85.

> "This statement of the law by the learned judge would be unimpeachable if there was evidence on record from which the existence of the custom could be inferred."

But there was no evidence, except the opinions of the assessors.

> "Had such evidence been forthcoming, either *pro* or *contra*, or both, the opinions of the assessors would then have been pertinent and could rightly have been acted upon by the learned trial judge." [27]

The court further observed in *R.* v. *Mutwiwa* [28] that the function of assessors in Kenya was essentially the same in criminal and in civil cases. It is submitted, however, that the roles of assessors in criminal and in civil proceedings are not the same, though there is a considerable overlap. The functions of assessors can be collected under two heads—their duty to assess, and their duty to advise. First, assessors may assess or weigh the evidence and whether an accused is guilty or not, in the light of their special knowledge of African habits, customs, modes of thought, and language; they are peculiarly qualified to judge the probability of the story told by a witness, and may detect in his demeanour what may escape the presiding judge. In this role the assessor's task is similar to that of the juror's, though he gives no verdict, but only his opinion, on the evidence. Secondly, the assessors' duty is to advise the judge or magistrates on the matters of which they have special knowledge, and to give their view, in the abstract, of what the custom or law is in the circumstances postulated. The former function is of special importance in criminal, the latter in civil, proceedings. When they act as advisers on African life and customs, the opinion of assessors is not, by itself, admissible evidence of those matters upon which a judge is entitled to rely in reaching a decision.[29] This is a salutary rule, as the party to whom such an opinion is unfavourable has no chance to contest the opinion, or introduce rebutting evidence, or cross-examine the assessors. The assessor is not, therefore, an expert witness in the ordinary sense. It would seem sound practice for the opinion of assessors, on matters of customary law pertinent to the case, to be given publicly, and to be recorded in writing.[30]

Whether the rules suggested here for the use of assessors are, or indeed should be, followed by administrative officers when exercising their appellate or revisionary powers in cases from native courts it is difficult to say. The system of assessors is open to abuse, as where the assessors sitting with a District Commissioner hearing an appeal from a native court are members of the native court which

[27] At p. 86.
[28] (1935) 2 E.A.C.A. 66.
[29] *Ndembera* v. *R.* (1947) 14 E.A.C.A. 85; *Mwale* v. *Kaliu* (1950) 6 Ny.L.R. 169; *R.* v. *Mporokoso* (1939) N.Rhod.L.R. 1938–1942, 152; Nigerian Evidence Ordinance, c. 63, s. 14.
[30] See *Dhalamini* v. *R.* [1943] 1 All E.R. 463 (P.C., Swaziland); and also *Kwanin* v. *Ewuah* (1955) P.C. Appeal No. 6 of 1954 (Gold Coast).

originally tried the case. It is noteworthy that the institution has been criticised in its country of origin, India, and that legislation has been recently introduced abolishing it.

Referees

Provision is made in a few territories for the reference of points of customary law to referees, who will be chiefs or other persons with special knowledge of customary law, or bodies with similar knowledge.[31] The referees have similar functions to the "assessors" we have been considering above, but their opinion on customary law is evidence thereof (unlike that of assessors), and that evidence is presumed correct, though the presumption can presumably be displaced by evidence to the contrary. If the presumption is irrebuttable, then the referees' statements of customary law are statements of law, and not evidence of fact at all. The latter interpretation of the similar provision in the Gold Coast Colony Supreme Court Ordinance, 1876, seems to have been assumed as the right one by Gold Coast judges; *e.g.*, in the old case of *Toku* v. *Ama*.[32]

The Gold Coast Colony courts used, at an early period, to ascertain the relevant customary law by writing a letter to a local "king" or chief, in which they requested the chief to give his opinion on the case stated (the identity of the parties being theoretically concealed). We find the Supreme Court at a later date referring a question of customary law to a native authority (*e.g.*, to the Ga State Council in the case of *Sackeyfio* v. *Tagoe* [33]).

By section 89 of the present Gold Coast Courts Ordinance,[34] the Supreme Court or a magistrate's court may, in a civil cause or matter, refer a question as to the rights of any native under native law and custom to a competent Native Court for determination. No appeal lies from the Native Court's decision on the issue; but the court seised of the case may adopt the Native Court's finding in whole or in part, or reject it *in toto*.[35, 36]

Textbooks

Customary law may be proved as a fact by documentary, as well as by oral, evidence, where books or manuscripts purporting to describe native law and custom are admissible in evidence.[37] If

[31] *Cf.* the Nyasaland High Court Ordinance, s. 16.
[32] (1890) Sarbah, Fanti L.R. 58; the dangers of this view are obvious.
[33] (1945) 11 W.A.C.A. 73.
[34] c. 4.
[35] *Quaere* whether the power of the court (under Gold Coast R.S.C., Ord. 37A) to appoint an independent expert as "Court Expert" applies where the question for an expert witness is one of native law or custom.
[36] And *cf.* Somaliland Indian Evidence Act (Modification) Ordinance, c. 14, s. 2.
[37] *Cf.* Uganda Evidence Ordinance, s. 58, which is identical in wording with the Indian Evidence Act, 1872, s. 60 (in force in Kenya, Tanganyika and British Somaliland); Nigerian Evidence Ordinance, s. 38; Gold Coast Courts Ordinance, s. 87 (2). For the Indian Riwaji-i-am (or public record of village and tribal customs) see Mayne, *Hindu Law and Usage*, 11th ed., 62.

the statements of customary law are treated as binding or conclusive, then the book is an authority, and the customary law is administered as law (*e.g.*, in the Gold Coast); whilst if the statements are only evidence of what the customary law is (as in Uganda and elsewhere), then that law is ascertained as fact.

The first point is that it is possible to have a legal textbook dealing with customary law, despite the fact that customary law must generally be proved by witnesses, and despite the observation of Verity C.J. in the Nigerian case of *Adedibu* v. *Adewoyin*,[38] where he said, in regard to a work dealing with native land tenure which was relied on by the trial judge:

> "The learned judge appears to have referred to it as though it were a legal textbook of such authority as would warrant its citation to the court, which it certainly is not, for native law and custom is a matter of evidence and not of law."

In the Gold Coast the British courts are specifically empowered to "give effect to any book or manuscript recognised in the Gold Coast as a legal authority"[39]; in fact Sarbah's *Fanti Customary Laws* has been very frequently cited to the Gold Coast courts (even as an authority for non-Fante custom). In the courts of the Union of South Africa and the High Commission Territories such legal textbooks as that by Whitfield on *South African Native Law* are constantly referred to. To be a work of legal authority it would seem, at first sight, that the author should possess professional legal qualifications, and that the approach, arrangement and scholarship should be those of standard English legal textbooks. A treatise by an anthropologist or administrator would thus, prima facie, not come within this category. It is all the more remarkable that a work by a well-known anthropologist, I. Schapera, *viz.* his *Handbook of Tswana Law and Custom* (the Tswana being the eponymous people of Bechuanaland), should be frequently cited and followed in the courts of the Union. In the Uganda case of *Njirwa* v. *Kagang'ama*[40] a similar compliment was paid to a work by a deceased anthropologist, Roscoe, on *The Banyankole*. The question was whether, by the customary law of Ankole, an African was entitled to make a will. The learned judge referred to Roscoe's old treatise, which says (at p. 144) that a man may nominate the successor to his estate, and applied this statement of the law to the present case (which in fact dealt with a rather different question, whether a man might bequeath *part* of his property away from his general heir).

In the already cited Nigerian case of *Adedibu* v. *Adewoyin*[41] the court came down on the other side. The dispute concerned the appointment by Yoruba customary law of the *Mogaji* of a House

[38] (1951) 13 W.A.C.A. 191, at p. 192.
[39] Courts Ordinance, s. 87 (2).
[40] (1935) 5 Ug.L.R. 146.
[41] 13 W.A.C.A. 191, at p. 192.

(*i.e.*, the head of a lineage or family). Conflicting evidence on the traditional custom in the matter had been adduced by each side in support of rival claimants to the position. The learned trial judge, in his judgment, had also referred to a published work by Ward Price, *Memorandum on Land Tenure in the Yoruba Provinces*, the author being an administrative officer who had carried out an intensive investigation of the customary law. On appeal to the West African Court of Appeal, one ground of appeal was that the court of first instance had erred in basing its judgment on this *Memorandum*.

Verity C.J., delivering the judgment of the W.A.C.A., said [42]—

"... It is well established that native law and custom is a question of evidence. It is only in so far as this case is based upon such law and custom that Mr. Ward Price's Memorandum is relevant. By section 38 of the Evidence Ordinance, c. 63, it is provided that:

'In deciding questions of native law and custom the opinions of native chiefs or other persons having special knowledge of native law and custom and any book or manuscript recognised by natives as a legal authority are relevant.'

In my view this involves two postulates, firstly that the Memorandum must form part of the evidence in the case, and secondly that it must be shown that it is a book or manuscript recognised by natives as a legal authority. In the present case it does not appear to have been tendered in evidence. The learned judge appears to have referred to it as though it were a legal textbook of such authority as would warrant its citation to the court, which it certainly is not, for native law and custom is a matter of evidence and not of law. Moreover, whatever may be the respect due to the result of the writer's researches, they are only relevant as evidence if shown to be recognised by natives as a legal authority, which again was not done in the present case. The learned judge makes reference to an earlier case in which he states that this Memorandum was relied on by both parties, from which he assumes that it is regarded as a legal authority. I do not think this necessarily follows, but in any event, the question is, as I have said, a matter of evidence and therefore a matter of legal proof and not a matter to be assumed. In my view, therefore, the learned judge erred in so far as he based his conclusions upon this document, which was not properly before him as part of the evidence in this case."

Judicial decisions

How far are judicial decisions evidence of African customary law, as opposed to precedents which establish customary law as law?

[42] At p. 192.

Cases involving customary law rarely reach the British courts originally, but only by way of appeal or revision,[43] since Africans are normally required to commence proceedings in the lowest competent court, to wit, a native court. It follows that disputes between Africans have already been adjudicated on by a court which treats customary law as a matter of law, not of fact or evidence, before they reach a British court. How is the appellate court to classify a finding of customary law by a native court of first instance or a native appeal court? On the theory that customary law is a question of fact in a British court, the native court's finding of customary law should be treated by the appellate court as if it were a finding of fact. An appeal court can freely consider and reject a finding of law in the court below; but there is a presumption that a finding of fact by a court which has heard the witnesses or which is peculiarly qualified to judge of the existence or nature of facts is correct. On this argument we should expect to find that appeal courts were reluctant to contest statements of customary law in the native court of first instance. Such indeed is the case: the principle was vigorously asserted in the Uganda case of *Kigizi* v. *Lukiko of Buganda*,[44] where the defendant had been prosecuted before the Principal Native Court of Buganda by the Buganda native government for an alleged offence against Buganda customary law, *viz.*, marrying the mother of the Kabaka (or ruler) of Buganda. The learned judge of the High Court (to which the case had come on appeal, by way of the Judicial Adviser, from the Buganda court), after remarking that proof of custom is different in native courts and British courts, went on to hold[45]—

> "... generally speaking, where a Native Court has held that a certain act is contrary to custom an appellate court should I think be reluctant to hold otherwise except upon very substantial grounds and should, unless it be repugnant to natural justice, give effect to the custom in its judgment, provided of course that it agrees with the Native Court's finding as to custom."

The learned judge, on the point whether the native court's finding that the act was contrary to customary penal law was justified, held in effect that this must be left in the hands of the native court, which was the best judge of whether it was a crime against the State and the whole community meriting criminal punishment.

With all respect, this is hardly a satisfactory position; it is vital that criminal law should be certain, and this applies to customary criminal law as much as to any other. Where the

[43] Except where the proceedings concern a claim or charge based on English law, or there is a "mixed transaction" (involving both English and African law), or where the dispute is between a native African and a non-native, or where natural justice, the absence of a competent native court, or the difficulty of or the amount at stake in the case, require or indicate that trial should not be in a native court.

[44] (1943) 6 Ug.L.R. 113.

[45] At p. 116.

question before a native court is not whether the defendant committed the offence alleged, but rather whether the act or omission constitutes an offence by customary law at all, an appeal court should be specially vigilant on behalf of accused, and should not lightly surrender the decision to the court of first instance. A Nyasaland case, *Limbani* v. *R.*[46] is relevant here. This was a criminal appeal before Jenkins C.J., the accused having been found guilty of adultery by a native court, the native court holding adultery to be a criminal offence by customary law. The learned judge refused to accept this finding (despite previous decisions of the native court the same way) on the ground that inquiry showed that the native law and custom prevalent in the district in question did not recognise adultery as an offence, and that native court decisions alone could not make it so.

The principle under discussion applies to civil, as well as to criminal, law; and to modified, as well as to ancient or original, native custom. That is the effect of the Uganda case of *Kajubi* v. *Kabali*,[47] before the Court of Appeal for Eastern Africa, which involved the Buganda customary law of succession. The Lukiko court of Buganda had applied a modified customary law; Gray C.J., delivering the judgment of the E.A.C.A., accepted the Lukiko court's statement of customary law, and said that there would have to be " very strong and cogent reasons " before the statement could be held wrong in an appeal court. But the presumption in favour of a native court's finding of customary law is not so strong where it is a question of modified, and not original, native custom; as the Judicial Committee observed in the Nigerian appeal of *Eleko* v. *Government of Nigeria*[48]:

> " . . . the more barbarous customs of earlier days [*e.g.*, to kill, and not to banish, a deposed chief] may under the influence of civilisation become milder without losing their essential character of custom. It would, however, appear to be necessary to show that in their milder form they are still recognised in the native community as custom, so as in that form to regulate the relations of the native community *inter se*. In other words, *the court cannot itself transform a barbarous custom into a milder one*.[49] If it still stands in its barbarous character it must be rejected as repugnant to " natural justice, equity and good conscience." It is the assent of the native community that gives a custom its validity, and, therefore, barbarous or mild, it must be shown to be recognised by the native community whose conduct it is supposed to regulate."

Gray C.J., in *Kajubi* v. *Kabali*,[47] held that the principle expressed in *Eleko* v. *Government of Nigeria*[48] applied equally to customs

[46] (1946) 6 Ny.L.R. 6.
[47] (1944) 11 E.A.C.A. 34.
[48] [1931] A.C. 662, at p. 673.
[49] My italics.

in Buganda, if for "barbarous" we substitute "original," and for "milder," "modified." He said [50]:

> "The native community may assent to some modification of an original custom, but the modification must be made with the assent of the native community. It cannot be made by an individual or a number of individuals. Least of all can it be made by a court of law."

The reluctance of the appeal courts to disturb a native court's finding of customary law, and the fact that they treat such a finding as one of fact, may, when taken with the Privy Council's settled practice regarding concurrent findings of fact, lead to an unsatisfactory situation where the customary law is not fully canvassed and examined except in the original court. The attitude of the Judicial Committee is clearly brought out in the Nigerian appeal of *Ometa* v. *Numa*,[51] where their Lordships observed—

> "The question was . . . entirely a question of fact and a question depending upon the knowledge of tribal tenures and of the habits and customs of native people in relation to dealings with land. It was decided by both courts in favour of the defendants, and it appears to be a case peculiarly within the principle of the rule that their Lordships have laid down themselves, that as a general rule they will not interfere with concurrent finding of fact in cases of this description." [52]

The Privy Council rule about concurrent findings of fact may have very good reasons behind it; but it also has a certain attraction to courts below the Judicial Committee, and there is a risk that some appeal courts (especially territorial Supreme Courts and regional Courts of Appeal) may adopt a similar rule in cases which may already have been before two or three courts successively. In this way the development of customary law as law might be seriously impeded.

What is the effect of a previous final judgment *inter partes* on the same or similar cause of action, or where a rule of customary law was proved in evidence, or was relied on by the court in arriving at its decision? First, as between the parties and their privies, the decision operates as an estoppel *per rem judicatam* (if so pleaded) and debars the parties from re-litigating, in later proceedings, the same cause of action, and from contesting the rules of customary law which formed the ground or part of the ground for the earlier decision.[53] Where a rule of customary law was proved or asserted by a party in the earlier proceedings, but it did

[50] At p. 37.
[51] 11 N.L.R. 18 (P.C.).
[52] See also the Gold Coast appeal, *Ameyaw III* v. *Safo* (1947) P.C. Appeal No. 66 of 1945 and the very recent Nigerian appeal, *Chief Joseph Wobo* v. *Att.-Gen., Federation of Nigeria* (1956) P.C. Appeal No. 18 of 1953, unreported.
[53] The earlier decision is also relevant by the terms of the Indian Evidence Act, 1872, s. 13.

not form part of the *ratio decidendi*, then that rule does not bind him in subsequent proceedings as law, though he may be estopped from later denying it. To summarise, previous decisions *inter partes* may either conclusively declare the law binding between the parties or may be admissible as evidence of that law.

Decisions between strangers

These, by virtue of being *res inter alios acta*, cannot be conclusive of the law binding on persons not party to the decision, unless they are judgments *in rem*, or enable later courts to take judicial notice of the customary law as found.[54] But such decisions are admissible as evidence of custom in the terms of the Indian Evidence Act, 1872, s. 13, and by the English law relating to local custom, it being a matter of public and general interest what the rules of customary law are.

Native Customary Law as a Question of Law

The ascertainment of customary law as if it were a matter of fact or of foreign law, to be proved by evidence, has many practical disadvantages; it may work injustice between the parties, and it is juristically inelegant. In the early, formative stage of customary law as applied by the courts, the proof of customary law as fact may be an inescapable necessity; but the goal must be to place customary law on an equality with the rest of the body of law that the courts are empowered to administer, *i.e.*, apt to be judicially noticed as part of the law of the land. The doctrine of judicial notice as expounded in the second branch of the rule in *Angu* v. *Atta*[55] serves progressively to incorporate the rules of customary law in the fabric of the law of the land; but the progress is slow. This has led legislators, administrators and others concerned with the development of African law to examine other means. Codification has a superficial attraction as the ready answer to the problem; but the modern view, in the light of experience with the Natal Code, shies away from codes in favour of manuals or records which shall be guides rather than authorities. A similar method of making the law accessible is through declarations by native authorities; but where the power has been given by statute it has rarely been used. If customary law is truly law, a single decision of a court would be a precedent of binding or persuasive authority for the future; but the method of case-law has been little used, except in the native courts. Legal textbooks, too, might be accepted as works of authority; but these are generally still to be written. A further complication is this, that when customary law is administered as law by virtue of its having been judicially noticed, laid down in a binding precedent, codified,

[54] See below at pp. 258 *et seq.*
[55] (1916) Gold Coast Privy Council Judgments, 1874–1928, 43 (P.C.).

declared, or stated in a work of authority, the basis of its application alters. The binding force of custom ultimately rests on the fact that it is habitually obeyed by those subject to it; if not fortified by established usage it is not law. But once custom has been codified or settled by judicial decision, its binding force depends on the statute or the doctrine of precedent; in short, it ceases to be customary law. A divergence is therefore not merely possible but likely between the law as administered by the courts and that followed by the public. The doctrine of judicial notice and the doctrine of precedent do not appear to be flexible enough to meet this divergence, in the absence of statutory provision or other direction to the contrary. African social, political and economic life are altering rapidly and radically, which makes the question of modification in customary law one of great importance. Old customs disappear or are modified; new ones appear to deal with new situations. The Gold Coast Native Courts (Colony) Ordinance,[56] s. 2, defines "native customary law" as "a rule or a body of rules . . . which obtains and is fortified by established native usage . . . ," so that, in the Southern Gold Coast at any rate, usage triumphs over judicial recognition; and it is submitted that, even where a custom has been judicially recognized, it is open to a party to show that it is no longer supported by established usage. But this Gold Coast provision is not found elsewhere.[57] The dictum of the Privy Council in *Eleko* v. *Government of Nigeria*[58]—"It is the assent of the native community that gives a custom its validity"—means (1) that when an "original" or "barbarous" custom ceases to be recognised by the native community it loses the force of law; (2) that a court, whether British or native, cannot itself modify a custom; (3) that when a modified custom is alleged, then it must be shown to be recognised, in its modified form by the native community whose conduct it is supposed to regulate. But the dictum does not cover the case where a custom has been judicially noticed, but it is alleged that the custom as observed has altered from the custom as noticed. If the possibility of varying by oral evidence a custom which has been judicially noticed is allowed, then there is an end to the certainty which the judicial recognition of a custom is designed to achieve.

Judicial notice

The power of colonial courts to take judicial notice of customary law was expressly stated in the second branch of the rule in *Angu* v. *Atta*,[59] the first branch of which—requiring the proof of

[56] c. 98.
[57] Commissions on native courts in Nigeria and Sierra Leone have recommended its adoption in those territories.
[58] [1931] A.C. 662, at p. 673. The dictum applied in the cases of *Limbani* v. *R.* (1946) 6 Ny.L.R. 8 and *Kajubi* v. *Kabali* (1944) 11 E.A.C.A. 34 (Uganda).
[59] (1916) Gold Coast Privy Council Judgments, 1874–1928, 43.

customary law as a fact—has already been considered.[60] The rule says that customary law must be proved in the first instance by calling witnesses

> "until the particular customs have, by frequent proof in the courts, become so notorious that the courts will take judicial notice of them."

The Judicial Committee, when approving this rule in the later case of *Amissah* v. *Krabah*,[61] observed—

> "Their Lordships have not been informed of any customary law so established [by judicial notice]; and they may observe that it would be very convenient if the courts in West Africa in suitable cases would rule as to the native customs of which they think it proper to take judicial notice, specifying, of course, the tribes (or districts) concerned and taking steps to see that these rulings are reported in a readily accessible form."[62]

To what extent may a judge or magistrate in a court in Africa rely on his own actual or presumed knowledge of customary law, and dispense with proof by other means? It is submitted, first of all, that a judge is not entitled to rely on his own personal knowledge of a rule of customary law, if unsupported by oral testimony or other proof.[63] A judge, if he wishes to rely on his personal knowledge of custom, may follow the English practice and himself be sworn and give his information as evidence; but the better course is for him to call evidence himself, or suggest to the parties that they should do so, in support of his personal view. A judge may also rely on his own knowledge where his knowledge is generally shared (*i.e.*, the fact is notorious), and where the rule has been judicially recognised. These aspects are considered below.[64]

In the law of England the doctrine of judicial notice, that a court shall notice, without further evidence, things which are or are deemed to be notorious, covers, it is submitted, two main categories: matters of law and matters of fact. Facts which are matters of general or common knowledge—the usual course of nature, what animals are domesticated—are judicially noticed as

[60] See above, at pp. 247 *et seq.*

[61] (1936) 2 W.A.C.A. 30, at p. 31 (Gold Coast).

[62] The Board's observation is an interesting one, which has not, however, been expressly acted upon. Presumably a court could only rule on a custom as worthy of judicial notice if that custom were material to the decision of a case before it.

[63] *Cf. Ndembera* v. *R.* (1947) 14 E.A.C.A. 85, at p. 86 (Tanganyika); and see also *Mwale* v. *Kaliu* (1950) 6 Ny.L.R. 169.

[64] A further point to be borne in mind is that frequently an administrative officer is called on to deal with a case involving customary law by way of revision of a native court's decision, and not by way of appeal. Normally revision takes place without any of the formal procedure appropriate to the hearing of an appeal, and the power to review may be exercised by the officer in his executive, and not in his magisterial, capacity. In these circumstances the officer will not be inhibited from relying on his personal knowledge of customary law.

a matter of convenience, because it would be absurd and time-consuming to have formal proof of them; the basis of this rule is the notoriety of the facts concerned. But when a court is required to take judicial notice of matters of law, which are deemed to be within the knowledge of the court, the doctrine rests on a different principle; the notoriety of the law is irrelevant. Now in taking judicial notice of African customary law the two aspects of the doctrine are sometimes confused, *i.e.*, it is not clear whether any given rule of customary law is noticed because it is a notorious fact, or because it has previously been recognised by a competent court and is now a rule of law. Both the dictum in *Angu* v. *Atta* [65] and the Nigerian Evidence Ordinance [66] appear to support the former interpretation. The analogy with foreign law breaks down at this point, since foreign law cannot be judicially noticed. It is submitted that the misleading principle that native law is foreign law, to be proved as a fact, is at fault here, since it is based on what Vaihinger [67] would call an "analogical fiction"; *i.e.*, customary law is treated *as though* it were foreign law for purposes of proof or ascertainment. Once so ascertained it applies as law. Hence if a rule of customary law is judicially noticed it should be noticed as law, and not as notorious fact, and the analogy with foreign law should be disregarded.

The rule in *Angu* v. *Atta* [68] appears to have been borrowed from the law of England relating to the proof of usage in trades and professions so as to vary the existing terms of, or annex implied terms to, a contract. Now the principle upon which usage is admitted is essentially that it is notorious, and that it is thereby to form an implied term in a contract of the type affected by it. But customary law is not an implied term or series of implied terms; it applies whether a particular person was aware of its existence, or had turned his attention to its existence, or not. If customary law need not be notorious amongst those subject to it, the rule in *Angu* v. *Atta* [68] must be differently interpreted from the similar English rule. "Notorious," in relation to African law, means—it is submitted—notorious to the judges or courts concerned with its administration. At the same time matters of common or general knowledge can be judicially noticed as notorious fact—judges have a wide discretion in what they thus admit; so the habits, manners or customs of the Africans can be judicially noticed. A distinction must thus be made between customs or

[65] (1916) Gold Coast Privy Council Judgments, 1874–1928, 43, 44; see especially the words ". . . until the particular customs have, by frequent proof in the courts, become so notorious that the courts will take judicial notice of them."

[66] c. 63, s. 14 (2): "A custom may be judicially noticed by the court if it has been acted upon by a court of superior or co-ordinate jurisdiction in the same area to an extent which justifies the court asked to apply it in assuming that the persons or the class of persons concerned in that area look upon the same as binding in relation to circumstances similar to those under consideration."

[67] In his *The Philosophy of "As If."*

[68] (1916) Gold Coast Privy Council Judgments, 1874–1928, 43, 44.

habits, which can be noticed as notorious fact, and customary law, which can be noticed as law.

Case-law [69]

If native customary law were strictly a question of fact, then—as with foreign law—previous decisions on a point of customary law would be no precedent in subsequent cases. In practice, however, previous decisions are relied on as expository of the law; courts are encouraged in this practice by the dictum in *Angu* v. *Atta*.[70] Judicial decisions have, in England, been a major factor in legal development; their scope in Africa—at least for the development of African law—is much more limited, since the superior courts of several territories have no jurisdiction, original or appellate, in suits based on customary law, and the reporting of decided cases in those other territories where customary law is administered in the superior courts is generally inadequate. No clear doctrine has emerged regarding the effect of previous judicial decisions on customary law. Where these are treated as authority (binding where a custom has been previously judicially noticed in terms of the rule in *Angu* v. *Atta*,[70] otherwise persuasive), problems may arise over the relative status of decision and usage.[71]

It is in the magistrates' courts (usually constituted by administrative officers) hearing appeals from native courts that the question of precedent is most likely to arise. Such courts will tend to follow the rulings of superior courts on customary law, whether judicially noticed or not; and they will also tend to follow their own previous decisions, though perhaps they are not bound to do so.

Legislation

An apparently attractive solution to the problem of the ascertainment of customary law is that of a written code; after all, the customary law of the Punjab was successfully recorded in writing.[72] Such a code might be enacted by the central legislature, or it might be the result of local legislation.

The only attempt to codify customary law from the centre has been made in Natal. The Natal Code of Native Law, originally compiled and issued in 1875–1878 and 1891 respectively, was revised in 1932.[73] Although that was the intention, in the nature of things the Code could not be made comprehensive and exclusive; there remain parts of the customary law which have not been codified, and these are to be proved to the satisfaction of the court,

[69] See T. O. Elias, "Colonial Courts and the Doctrine of Judicial Precedent" (1955) 18 M.L.R. 356.
[70] (1916) Gold Coast Privy Council Judgments, 1874–1928, 43, 44.
[71] See above at pp. 257 *et seq.*
[72] By Sir W. Rattigan, *op. cit.*; his work, though lacking the force of a code, has great authority.
[73] See Stafford and Franklin, *Principles of Native Law and the Natal Code*, 1950.

in the usual way, by evidence. Parties can adduce evidence tending to supplement, but not to oust or contradict, the provisions of the Code. Modern opinion is against codification of customary law, in that it would freeze the law at one stage of its development, and would tend to inhibit future change at the hands of the courts, native and British. Natal's initiative has thus not been imitated.[74]

Central legislation may also have an incidental effect on customary law, by abolishing, limiting, or modifying its rules. For example, Native Courts Ordinances prescribe how customary law is to be administered, and may expressly restrict its application through "repugnancy-clauses." In some territories much of the customary criminal law has thus ceased to apply.

Local legislation, *i.e.*, by native or local authorities, may also be a source of customary law; directly, where customary law is declared or modified; indirectly, where local rules, orders and by-laws restrict its operation. The law of many territories contains provisions which enable native authorities to declare, in prescribed form, any part of the customary law applicable in their areas.[75] The power has been sparingly used. The Basuto *Laws of Lerotholi*[76] are, in their 1946 form, mainly a collection of rules and orders unconnected with customary law; the first part, the Declaration of Basuto Law and Custom, is the product of the Basutoland National Council. The Council in fact lacks legal power to make an enforceable declaration of custom; nevertheless, the *Laws of Lerotholi* are reported to be unhesitatingly followed in the Basuto Native Courts, and even to be treated as of some authority in the High Court of Basutoland. This Declaration is not, however, a complete or ordered statement of Basuto customary law. H. Cory's statement of Sukuma Law[77] is in effect a declaration by the native authorities in Sukumaland of their customary law, although not made in pursuance of any statutory power.

Native authorities are also permitted in many territories to modify their customary law by declaration or resolution.[78] This power has also been sparingly used. Declarations and modifications of customary law generally have the force of law in the native courts of the area in question, and are admissible as evidence of that law. Some competent students of the law in Africa look to such declarations and modifications of customary law as the best

[74] But see R. J. H. Pogucki, "A Note on the Codification of Customary Land Law in the Gold Coast" (1956) 8 J. African Administration 192.

[75] *e.g.*, Ashanti, Gold Coast: Native Law and Custom (Ashanti Confederacy Council) Ordinance, c. 102.

[76] Originally compiled in 1903, published in 1922, and re-issued in revised form in 1946.

[77] In his *Sukuma Law and Custom*, 1953, the materials for which were collected and formulated in close collaboration with the various native authorities in Sukumaland, Tanganyika.

[78] *e.g.*, Sierra Leone Protectorate Ordinance, c. 185, s. 5 (7): ". . . it shall be lawful for a District Council, with the approval of the Governor in Council, to make rules altering or modifying native customary law in the District and all Native Courts in the said District shall take cognisance of all rules so made."

way in which the present law can be made available, and in which it can be modified to suit future developments.

Again, local legislation by means of rules, orders and by-laws often has the effect of varying customary law. The Ashanti Confederacy Council, for instance, at various times made rules regulating the payment of adultery fees, the cultivation of cocoa farms, repayments on divorce, etc.[79]

Envoi

This paper seeks merely to describe the *machinery* for the ascertainment of customary law; space does not permit examination of how the machinery works in practice. Nor has anything been said about the ascertainment of customary law in the native courts, which was not, but which is and will be, a problem to be tackled. Since it is practice that breathes life into the law, a complementary paper that would deal with these aspects of the subject is urgently needed, if a full picture is to be given. Deficiencies in the ascertainment and administration of customary law revealed by reported cases emphasise the need for such an examination.

A. N. Allott.*

[79] For which see J. N. Matson, *Digest of the Minutes of the Ashanti Confederacy Council, etc.*, 1951.

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REPORTS OF COMMITTEES

Perpetuities

The Law Reform Committee's Fourth Report (Cmnd. 18 (1956)) is concerned with the Rule against Perpetuities. A summary is difficult since the Report is closely reasoned clear and concise; it sets out the law as it now stands, the defects in the application of the Rule, the possible methods of reform and substantial suggestions for the Rule's amendment. The Report, as does the Rule, falls into three heads. "First there is the rule against remoteness of vesting which invalidates any trust or limitation which might by possibility fail to become vested in interest (if it vests at all) within the permitted period of a life or lives in being and twenty-one years thereafter. Secondly, there is the closely allied rule against restrictions on alienation which invalidates trusts or limitations whereby property is rendered inalienable for longer than the permitted period. Thirdly, there are the rules against excessive accumulations which restrain the accumulation of income for longer than the appropriate statutory periods."

Considering the first and most important limb of the Rule, the Committee takes it to be "beyond argument" that there must be some limit on the vesting of future interests and approaches the matter from the point of view that it is only in the permitted period that a change could be introduced. After discussing the difficulty of using a "Royal lives" clause, the Committee recommends that "the perpetuity period shall be such a period of years not exceeding eighty years as may be specified in the instrument creating the limitation but that if no such period is specified the period shall be the existing perpetuity period."

The Report then discusses the three principal methods of reform to remove the existing defects in the application of the Rule. From this emerges the following (among eighteen, on this limb of the Rule alone) substantial recommendations as amendments to the Rule. First that no limitation should be invalidated by an "impossible possibility" and that

> "(a) there should be a presumption, rebuttable by any evidence to the contrary tendered at the time at which the matter falls for decision (but not subsequently)—
>
> (i) that no woman who has attained the age of fifty-five years is capable of bearing a child; and
>
> (ii) that a male or female who has not attained the age of fourteen years is incapable of procreating or bearing a child; and

(b) that medical or surgical evidence that a male or female of any age is incapable of procreating or bearing a child should be admissible in any court in order to establish such incapacity, and that the court should be empowered to accept such evidence of a high degree of improbability of procreation or child-bearing as it thinks proper as establishing such incapacity."

Secondly, that the validity of a limitation should depend not on the facts which *may* occur but on the facts which *do* in fact occur, that is, that the principle of "wait and see" should be applicable in determining the validity of the limitation and that the trustees should be able to apply to the court as to such validity. Thirdly, that no class gift should be invalidated by the failure of the limitation to some only of the members of the class. Fourthly, that no limitation which itself complies with the Rule should be invalidated solely by reason of being preceded by one or more invalid limitations, and where a limitation is void for perpetuity any subsequent valid limitation should be accelerated. Fifthly, whereas any option contained in a lease enabling the lessee for the time being to purchase the freehold or other superior interest should be wholly exempt from the rule, any other option to acquire an interest in land which purports to be exercisable for a period in excess of twenty-one years from the date of the grant should be valid and exercisable during such period of twenty-one years, but thereafter it should be void even as between the original parties to it.

In considering the second limb of the Rule, the Committee feels that the problem is now linked with the wider question (outside the Committee's terms of reference) whether any trust can validly exist if the objects of the trust are not human beneficiaries but animals or some purpose (see *Re Astor's Settlement Trusts* [1]). In a narrower sense the problem arises in particular in relation to the upkeep of graves and tombs, and to lay the dust on the difficulties of *Re Chardon* [2] the Committee recommends that it should be possible to subject a limited sum of money (it suggests £1,000) to a trust valid in perpetuity to use the income for the maintenance of any grave, tomb or monument.

Finally, on the third limb of the Rule the Committee considers that on the whole the general scheme of statutory regulation of accumulation calls for no change.

P. Stanley.

[1] [1952] Ch. 534.
[2] [1928] Ch. 464.

NOTES OF CASES

Gold Clauses in Domestic Transactions

The difference between a promise to pay £100 in notes and a promise to pay £100 in silver coin lies in the manner of payment. But let gold coin be substituted for silver coin and, according to *Feist* v. *Société Intercommunale Belge d'Electricité* [1] the difference becomes one of amount. A promise to pay £100 in gold coin is not a promise to pay £100, but such amount as will buy £100 in gold coin.

If this is the meaning we must give to a promise to pay £100 in gold coin, what is meant by a promise to pay £100 "in gold coin or in notes to the equivalent value of gold coin"?

In *Treseder-Griffin* v. *Co-operative Insurance Society, Ltd.* [2] this question arose in an action brought by a landlord claiming rent under a lease, granted in 1938, which provided for an annual rent of £1,900 "in gold sterling or Bank of England notes to the equivalent value in gold sterling." Lord Goddard held that the *Feist* construction applied *a fortiori* and gave judgment for the landlord for £7,505, which was agreed to be the current price of 1,900 gold sovereigns. This decision was reversed by a majority of the Court of Appeal who held that the landlord was only entitled to £1,900. Harman J., who dissented, held that the landlord was entitled to rent based, not on the market value of sovereigns, but on the rather lower value of the gold content of sovereigns. This basis of calculation would seem preferable to that used by Lord Goddard, as the gold clause was introduced to protect the landlord against depreciation of sterling, which was feared, but not in order to secure for him windfalls due to unforeseeable fluctuations in the price of sovereigns.

The majority of the Court of Appeal, in order to arrive at their decision, had to distinguish the decision of the House of Lords in *Feist's* case. In fact, only Lord Justice Morris tried to do this, the judgment of Lord Justice Denning being largely occupied by a discussion of the legality of gold clauses. Lord Justice Morris pointed out that the construction of the clause used in the *Feist* case was explained by the fact that payment in gold coin, which was the only form of payment mentioned, would have been impracticable. In the present case provision had been made for alternative forms of payment. Payment in one of these forms was practicable. It could therefore be concluded that the parties were concerned with

[1] [1954] A.C. 161.
[2] [1956] 2 Q.B. 127.

the manner of payment, that they wanted to make it clear that payment was to be made, if not in gold coin, then in notes and not by cheque.

Even if this were conceded (although it is not easy to see why the parties should have objected to cheques), it still would not follow that this was the only reason for the clause. The intention to deal also with the amount of payment appears quite clearly from the addition of " to the equivalent value in gold sterling " to the words providing for payment in notes. Lord Justice Morris thought that " equivalent value " meant nominal value and he appeared to suggest that this would be the natural or literal reading of the phrase. " Anyone reading the lease," he said, " without critical consideration of all its words might confidently conclude that the obligation of the lessees was to pay £1,900 rent, and such obligation could be discharged either by paying £1,900 in gold or by paying £1,900 in notes."

One might have thought that, since *Feist's* case, the impressions formed by uncritical readers are of little value in the construction of gold clauses. Even such readers would probably suspect that in the present case the parties had been thinking of the danger of depreciation of sterling and had tried to provide some protection against it.

It is perhaps not surprising that Lord Justice Morris should have felt the need for justifying his refusal to adopt the *Feist* construction by offering a lengthy catalogue of the difficulties which this construction would produce. Some of these difficulties were the results of defective drafting, others arose from the unforeseen turn of events. Some points had been raised and answered in *Feist's* case, others could be resolved, as Harman J. showed, by examining the circumstances under which the lease had been granted. None of these difficulties presented insuperable obstacles, nor could they be taken as a satisfactory basis for distinguishing the decision in *Feist's* case.

There remained, however, the possibility of distinguishing this decision on the ground that the court there was dealing with an international contract, whereas the present case was of a purely domestic character and indeed appears to be the first reported instance of a domestic gold clause. Lord Justice Morris did not take the point, although it was considered and rejected as irrelevant by the Lord Chief Justice and by Harman J. Lord Justice Denning attached decisive importance to it, not, however, on the question of construction but on that of the legality of the gold clause.

On the other hand, it seems clear that Lord Justice Morris as well as Lord Justice Denning approached the question of construction in a spirit of hostility towards gold clauses even if this found articulate expression only in the observations of Lord Justice Denning on the legality of domestic gold clauses. If the domestic nature of the clause was considered by him to be relevant

on the question of legality, it could not be irrelevant on the matter of construction. His failure to press his doubts of the legality of domestic gold clauses to a conclusion may well be explained by the fact that he discovered, as the Permanent Court of International Justice had done much earlier (in the Case of Serbian Loans), that "the treatment of the gold clause as indicating a mere modality of payment without reference to a gold standard of value, would be, not to construe, but to destroy it."

It will therefore not be possible to dismiss attempts, which probably will be made, to stress the decisive importance of the domestic nature of the gold clause, on the ground that this circumstance was not discussed in relation to the question of construction. Nevertheless, such attempts to introduce into English law a distinction between internal and international gold clauses should be resisted. This distinction, it is submitted, is unsound whether tested by considerations of economic policy or by the principles of legislation.

The fears expressed by Lord Justice Denning that gold clauses might lead to sterling becoming "a discredited currency unable to look its enemy inflation in the face" would explain the prohibition of gold clauses attached to obligations expressed in sterling, as distinct from obligations expressed in other currencies. But why should a creditor in this country lending sterling to a debtor abroad be allowed to express his lack of faith in sterling in a gold clause, whilst no such demonstration of no confidence should be allowed when lending to a debtor in this country? It is at the very least arguable that the internal standing of sterling cannot be completely isolated from the credit it enjoys abroad. Lord Justice Denning's assertion that "in England we have always looked on a pound as a pound whatever its international value . . . other currencies may go up and down, but sterling remains the same" must be read as an assumption made for legal purposes, rather than as a realistic assessment of fact or even of opinion. Legislation may continue to proceed on this assumption (even although this may lead to difficulties, as where fines have been fixed within limits which have become inadequate, as in *St. John Shipping Corporation* v. *Joseph Rank, Ltd.*[3] but there is no reason why the parties to a contract should be compelled to act on the same assumption).

The gist of the objection to discrimination against internal gold clauses is that it accepts and encourages a distinction between the international and internal value of sterling. The legal objection to the distinction between domestic and international gold clauses is essentially the same, namely, that it impedes the interchange of laws which is the accepted purpose of the Conflict of Laws. The fact that a gold clause is found in an international contract is

[3] [1956] 3 All E.R. 683.

significant, but only in that it permits a choice of the proper law of the contract. Once this choice has been made and English law has been selected, the significance of this fact has been exhausted and the English law of contract is available to the parties. If at this stage, however, it becomes again necessary to ask whether each particular rule of the English law of contract, such as the prohibition of gold clauses, can apply to an international contract, then the initial selection of the English law of contract has been nullified. The general choice of law rules of the Conflict of Laws would be replaced by choice of law rules attached *ad hoc* to particular rules of internal law. Except against a background of a system of capitulations, such *ad hoc* choice of law rules have generally proved disastrous. This is also shown by the French experience of the distinction between internal and international gold clauses which was introduced by the Cour de Cassation after the Franco-Prussian war. It has been a fruitful source of litigation and controversy but has not been conspicuously successful in protecting the franc.

In passing, it may be observed that the distinction between internal and international contracts cannot be derived from the concepts of *ordre public interne* and *international*. These concepts are concerned with international contracts governed by foreign law, not with international contracts governed by the *lex fori*.

The distinction between domestic and international gold clauses may have been drawn by Lord Justice Denning not entirely by choice, but in order to reconcile his conclusions with the decision of the House of Lords in *Feist's* case. This raises the question whether, quite apart from this distinction, it was right to change the benevolent attitude hitherto shown to gold clauses into one of active dislike, manifested in hostile construction, if not in direct prohibition.

It may not be easy to suppress gold clauses or their substitutes by legislation, especially by judicial legislation. Such efforts, however, might achieve some success, provided their aim is clearly understood. If gold clauses aim at protection against inflation it seems strange that they should be condemned for their alleged inflationary tendencies. Such condemnation appears to confuse cause and effect. Gold clauses, in other words, are a symptom more than a cause of inflation. Even if everyone were to use them (which is the prospect usually offered as conclusive proof of their dangerous properties), the result would be, not to spread inflation, but to deprive it of its terrors. It might be more honest to condemn gold clauses on the ground that they are apt to frustrate such inflationary policies as are sought to be achieved by legislative devaluation or abandonment of convertibility. It makes sense that where for instance devaluation of the currency is thought to be necessary in the national interest, there should be legislative or judicial abrogation of gold clauses which threaten to defeat the policy of the devaluating statute. But where, as in this country,

creeping inflation has set in, despite all efforts to arrest it, it becomes more difficult to applaud efforts which remove one of the existing obstacles to such creeping inflation. It then only remains to argue that there should be equality of sacrifice. If all cannot be saved, none must escape. As the ethics of this sentiment are highly questionable, it is not surprising that Harman J. should have found "nothing in public policy which should forbid a landlord [of uncontrolled premises] parting with his land for a long term of years from attempting to protect himself."

J. UNGER.

THE UNIMPORTANCE OF THE CASE OF PRINCE ERNEST

Attorney-General v. *Prince Ernest Augustus of Hanover* [1] provoked much comment, both in the general press and in legal periodicals, on its way to the House of Lords.[2] The decision of the House did something to maintain the general interest, but it also ensured that if the name of Prince Ernest is to achieve immortality through litigation it will do so as a footnote in the books on statutory interpretation and not in those on constitutional law.

The facts were simple. Prince Ernest claimed British nationality under an English Act of 1705 (4 Anne c. 4)[3] which declared that all persons lineally descending from the Electress Sophia ". . . be and shall be to all intents and purposes whatsoever, deemed, taken, and esteemed natural born subjects of this Kingdom as if the said Princess and the issue of her body, and all persons lineally descended from her born or hereafter to be born had been born within this realm of England." The point decided by the House was simply that the Act meant what it said when it apparently covered all future descendants, and that this meaning was not cut down by the explanatory preamble. What was not decided was the effect of the Treaty or Act of Union, 1707; Lord Simonds, Lord Normand and Lord Morton (a majority of the House) expressly reserved their opinion on this point.

It was one of the peculiarities of the Acts of Union (which from a constitutional standpoint can be the only relevant documents) that on many important matters they did not regulate the law that was to govern common political institutions of the new United Kingdom.[4] Provision was made, though elliptically, for a common citizenship by art. 4 which, after securing free trade, provides

[1] [1957] 2 W.L.R. 1; [1957] 1 All E.R. 49.

[2] See, *e.g.*, Mr. Clive Parry (1955) C.L.J. 142 and (1956) I.C.L.Q. 61; Dr. Farran in (1956) 19 M.L.R. 289; Professor T. B. Smith in 1956 S.L.T. (News) 89; the notes in (1956) 72 L.Q.R. 5, and correspondence in *The Times* on November 18 and 26, 1956.

[3] Repealed, but not retrospectively, by the British Nationality Act, 1948, Sched. IV; Pt. II.

[4] Thus, after a short period of uncertainty, the disqualifications for membership of the House of Commons were regulated afresh by statute.

"that there be a communication of all other Rights, Privileges and advantages which do or may belong to the subjects of either Kingdom except where it is otherwise expressly agreed in these Articles." It could be argued therefore that whoever was, or might be, an English subject became a subject of Great Britain, and thus Prince Ernest's claim under the Act of 1705 was not cut down, but enlarged by the Act of Union. Some arguments of convenience could support that view; since one object of the Act of 1705 was to encourage those who might rule over a country to become familiar with it, it would be reasonable to hope that they should become familiar with the greater whole into which it had developed. For this view there is some, but weak, judicial authority.[5] Parliamentary precedent is conflicting. The Act of 4 Geo. 3, c. 5, naturalising the Duke of Brunswick-Luneburg, seems to suppose that the Act of 1705 no longer operated, yet in other instances no statute was passed, on the assumption that the Act of Anne made it unnecessary.[6]

On the other hand there is judicial foundation in *Macao* v. *Officers of State*[7] for an argument that the Act of Anne is to be held repealed under Art. 25 as being contrary to or inconsistent with the Act of Union. Macao, an enterprising Chinaman, had hoped that he had acquired Scottish (and hence British) nationality under a Scots Act of 1695,[8] by acquiring shares in the Bank of Scotland. The House of Lords rejected the claim, though it is difficult to determine the *ratio*. The views of Lord Redesdale are clearly erroneous in denying jurisdiction to the Court of Session as a local jurisdiction. On a similar argument the Chancery Division had no jurisdiction in the present case. Similarly much of the argument of the Lord Chancellor (Eldon) cannot now be accepted. Yet when those parts are left on one side he had only two reasons for rejecting Macao's claim, which were expressed as alternatives; one that the provision in the Act of 1695 applied only to the original subscribers, the other that "the Act of Union has taken away the effect of the clause."

The equation of the case of Prince Ernest to that of the enterprising Chinaman presents difficulty. It can be argued that the Scots Act was private, that of Anne clearly public. Yet the Scots Act gained in strength from statutory ratification after the Union.[9] Many of the inconveniences which led Lord Eldon to

5 *Duke of Brunswick* v. *King of Hanover* (1844) 6 Beav. 1 and (1848) 2 H.L.C. 1; the statements there are however *obiter*.

6 See Hatsell, *Precedents*, Vol. 2, p. 7 (4th ed.).

7 (1822) 1 Shaw 133. Only a bare outline of this case is given here, for a fuller account see Prof. T. B. Smith, "British Nationality and the Union of 1707," 1956 S.L.T. (*supra*).

8 A.P.S. IX 494, an Act offering naturalisation to shareholders.

9 Moreover it did not differ in purpose from those general Acts of naturalising fishermen, recruits, etc. which were preserved by 58 Geo. 3, c. 97, the "holding" legislation which temporarily suspended any application of the Act of 1695, parts of the latter, too, were of general constitutional significance.

reject the broad interpretation and continued validity of the Act in *Macao*, are also present if the broad interpretation of the Act of Anne is accepted. Moreover, the Act of Union itself did not assume that all references to England in existing legislation would in future be taken as referring to Great Britain even when dealing with common institutions,[10] and writers of some authority have maintained the view that pre-Union naturalisation statutes fell as a result of the Union.[11]

It is not, however, necessary to reach any conclusion on what would have been the result in *Prince Ernest's* case had the Act of Union point been argued. The fact that it is a relevant and arguable one, and was not taken, robs the decision of real force. The House of Lords is not bound by its own decisions which are taken without consideration of relevant statutes; nor is any inferior court. Clearly then any existing claimants in a like state to the Prince cannot shelter under his umbrella. Perhaps even the Prince himself cannot regard the matter as concluded. Should the Custodian of Enemy Property hold assets of his it is not clear that the Custodian is bound by the decision. There is authority in both jurisdictions that the doctrine of *res judicata* binds the Crown,[12] but none of the cases involves a similar neglect of statute, let alone neglect of a statute which, whatever view is taken of the sovereignty of Parliament, must be regarded as a constituent Act.

Even if all this is disregarded the case still remains unsatisfactory. The Attorney-General declined to argue or press the Act of Union point on the grounds that it was not in the pleadings and that it was not a good one. Doubtless he was within his rights, yet if Dicey's proposition, that it is an advantage that constitutional issues are decided in ordinary litigation, is to be accepted at all, it must be on the assumption that these issues are fully argued. Concessions, and a rigid adherence to the confines of the pleadings as drawn by the parties may be important in private law. In matters of public right there are sound reasons for urging that the courts should have a power of requiring pleadings to be amended if necessary. In such matters the parties may not be the best judges of what are the relevant issues. Moreover, the goodness or badness of the argument is not to be determined by counsel but

[10] Art. XXII although incorporating the existing provisions as to oaths to be taken by members of both Houses of Parliament expressly provided for the alteration of the meaning of the words " Crown " and " Realm " used in these oaths.

[11] See *e.g.*, Bankt. 1. II. 65.

[12] See the cases discussed by F. E. Farrer, " A Prerogative Fallacy—that the Crown is not bound by Estoppel " (1933) 49 L.Q.R. 511 at 512, and such cases as *Thomson* v. *Lord Advocate* (1872) 10 M. 849. It is not clear how the doctrine of *res judicata* is affected by the other doctrine, that the Crown is not to be prejudiced by the acts of its servants. The latter is long established in Scotland, see *e.g.*, *Lord Advocate* v. *Pringle* (1878) 5 R. 912, but also inherent in such decisions as *Terrell* v. *S. of S. for Colonies* [1953] 2 Q.B. 482. As to the effect of failure to consider a statute, see *Moss's Trustees* v. *Bramwell*, 1935 S.C. 123.

by the court, otherwise there could obviously be some opportunity of by-passing inconvenient legislation. In the present case, as a result of the failure to determine this point, it is possible that the Crown is entitled to raise it against Prince Ernest in the future. If this is so, then much time has been wasted. If, on the other hand, the Crown is not entitled to do so, then on one hypothesis, a new form of naturalisation has been achieved—naturalisation by estoppel. Naturalisation under an archaic statute may, although inconvenient, have to be tolerated, but there is very little to be said for naturalisation which depends on procedural rules and whims of pleading.

J. D. B. Mitchell.

Sovereign Immunity

The doctrine of sovereign immunity, so frequently referred to in these pages over the last few years,[1] was again extended by the decision of the Court of Appeal (Jenkins and Parker L.JJ., Singleton L.J. dissenting) in the case of *Baccus* v. *Servicio Nacional del Trigo*.[2] It was presumably this case which Master Lawrence had in mind when, on the occasion of the International Law Conference organised by the David Davies Memorial Institute in June, 1956, he urged some change in the law to protect traders who enter into contracts with a corporate body which they believe to be an ordinary trader, but which in fact is a department of State: Report, p. 32.

The defendant, Servicio Nacional del Trigo, a legal entity under the law of Spain, had sold a large quantity of rye to the plaintiffs, an Italian company. Disputes arose and the plaintiffs instituted proceedings in this country. The writ was served on the defendants in Spain. On the instructions of the head of the defendants an appearance was entered in October, 1954, by London solicitors to whom in November, 1955, a Statement of Claim was delivered. In January, 1956, the defendants obtained an order for security for costs, which was complied with by the plaintiffs. In April, 1956, the defendants claimed immunity. Their application succeeded before Master Lawrence, Pearce J. and the Court of Appeal. It was proved that by Spanish law the defendants, though enjoying corporate entity, were a department of State whose functions were described by Spanish law as follows: "The buying and selling of wheat appertains exclusively to the Servicio Nacional del Trigo in respect of the importation and exportation of that product decreed by the Government." There was also evidence to the effect that

[1] See (1949) 12 M.L.R. 494; (1952) 15 M.L.R. 220; (1955) 18 M.L.R. 184, 417.
[2] [1956] 3 All E.R. 715.

by Spanish law "only the Minister of Agriculture (apart from the Cabinet or the Head of the State) had authority to decide whether or not the Servicio Nacional del Trigo should submit to the jurisdiction" of an English court.

In *Krajina* v. *Tass Agency*[3] the Court of Appeal did not decide the question whether a department of State is necessarily deprived of immunity by reason of its separate legal existence. In the present case Singleton L.J. answered this question in the affirmative, because he refused to extend the doctrine of immunity. The majority, however, thought otherwise. In the words of Jenkins L.J. it was decisive that the defendants' "functions were wholly those of a department of State." Their status was "purely a matter of governmental machinery," so that their corporate character was not really material. And the Spanish State was impleaded, for, although the defendants were a corporate body, "the party sued is in truth a department of a sovereign State" (p. 732). It is interesting to observe how a plea which was originally founded exclusively on the defendant's status has come to be based upon the defendant's functions. In the present case the Court of Appeal was careful to emphasise (at p. 732 *per* Jenkins L.J.) that "each case must depend on its own facts, and it is not to be taken as following from what I have said so far that every corporation in which a foreign sovereign State may be interested, whatever the nature of the activities of the corporation and whatever the nature or extent of the interest taken by the foreign sovereign State, becomes itself a department of State." Yet if present judicial tendencies continue it is not at all unlikely that this country will accord immunity to a foreign corporation which is controlled by a foreign State and exercises "public functions." The use of this phrase by Jenkins L.J. (at p. 733), which was hitherto confined to cases of indirect impleading, is particularly significant or, as some may think, ominous.

The Court of Appeal was also divided on the question of waiver. Singleton L.J. was not satisfied that the Head of the Servicio had no power to waive the plea of immunity, and held that instructions given by him "in the ordinary course" within his apparent authority were binding upon the State. The majority thought that, as Parker L.J. said (at p. 735), the Head of the Servicio acted "without the knowledge of his superiors and in ignorance of his rights and without actual authority" and that, therefore, the plea had not been waived. There is much force in Singleton L.J.'s warning (p. 731):

> A State may create many such trading entities. If they act in the ordinary course it ought not to be open to the State to say that they were not authorised so to do. Otherwise trading and business relationships would become impossible.

[3] [1949] 2 All E.R. 274.

Krajina v. *Tass Agency*, *ubi supra*, led the then Lord Chancellor, Earl Jowitt, to appoint a Committee which was instructed to consider this branch of the law, but which, as earlier related in this *Review*, was disbanded in 1953. Perhaps the present case will induce his successor to make a fresh move for reform and thus to pay tribute to the memory of Singleton L.J. It is unfortunately not open to doubt that, probably without compelling necessity, the Court of Appeal has over the years allowed the effects of the plea of sovereign immunity to become so broad that the English practice is now not only almost unique, but also a source of danger to international trade.

F. A. Mann.

Unintentional Contempt of Court

"There cannot be anything of greater consequence than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters." Thus spake Lord Hardwicke L.C. in *Roach* v. *Garvan* (*or Hall*) (the *St. James's Evening Post* case).[1] To which may be added the statement of Wills J. in *R.* v. *Parke*,[2] that "It is possible very effectually to poison the fountain of justice before it begins to flow." It is in order to keep the streams of justice clear and pure and the fountain whence they flow unpoisoned that the courts have assumed power to punish contempt of court.

The case of *R.* v. *Odhams Press, Ltd. and Others, ex p. Att.-Gen.*[3] appears to extend this power of the courts to punish for contempt to a case of unintentional contempt, where there was no knowledge that proceedings were pending. The facts were that one of a series of articles dealing with prostitution and brothel-keeping in London appearing in a Sunday newspaper alleged that one Micallef was engaged in the business of purveying vice and managing street women and urged his arrest and prosecution. Micallef had in fact already been arrested and brought before a magistrate charged with brothel-keeping, and at the time when the article appeared was awaiting trial at quarter sessions. The Attorney-General moved for writs of attachment against Odhams Press, Ltd., the printers and publishers of the newspaper, the editor, and the reporter concerned with these articles. It transpired that the newspaper had made arrangements with court reporters for the supply of reports of cases relating to prostitutes and brothel-keeping, but in fact no information was given to the editor and the reporter, and they did not know of the proceedings against Micallef. The respondents did not dispute that the article

1 (1742) 2 Atk. 469, at 471.
2 [1903] 2 K.B. 432, at 438.
3 [1956] 3 W.L.R. 796.

tended or was calculated to prejudice the criminal proceedings against Micallef, and expressed their sincere apologies to the court. They contended, however, that they were not guilty of contempt since they had no knowledge of the pending criminal proceedings.

The reserved judgment of the Divisional Court (consisting of Lord Goddard C.J., Pilcher and Ashworth JJ.) was delivered by Lord Goddard. The court held each of the respondents guilty of contempt, and imposed substantial fines.

Lord Goddard, after reciting the facts, observed that "anything more calculated to prejudice a fair trial could not well be imagined." He said that the submission of the respondents that because there was no knowledge of the pending proceedings there was no contempt could be "summarised by saying that the contention is that *mens rea* is a necessary constituent of the offence." Describing this argument as at first sight an attractive one in connection with criminal contempt, he said that a review of the cases showed that "persons who publish matter of this description charging alleged offences against the criminal law do so at the risk of not only being sued for libel but also of being punished for contempt if the criminal law has been set in motion."

The conclusion that *mens rea* in the sense of intention is not required in order to constitute contempt seems to be supported by authority,[4] but it does not follow by any means that contempt does not require *mens rea* in the sense of either recklessness or negligence. It is the failure to analyse *mens rea* in terms of these alternatives which makes the judgment so unsatisfying. All that is said is that the cases show "lack of intention or knowledge is no excuse," and that "the test is whether the matter complained of is calculated to interfere with the course of justice, not whether the authors and printers intended that result . . . ," and that the publication of matter of this description "is at the risk of those responsible for it."

If the court had paused to consider what was meant by the words "calculated to interfere with the course of justice," it would probably have agreed that this meant that recklessness was involved here, and it was this which the court must punish.[5] Recklessness (in this sense) involves foresight of the possibility of a consequence but differs from intention in that there is no desire

[4] *Roach* v. *Garvan* (1742) 2 Atk. 469; *Ex p. Jones* (1806) 13 Ves.Jun. 237; *R.* v. *Dolan* [1907] 2 Ir.R. 260.

[5] Compare the similar test adopted by Wills J. in *R.* v. *Parke* [1903] 2 K.B. 432, at 436–437: "The reason why the publication of articles like those with which we have to deal is treated as a contempt of court is because their tendency and sometimes their object is to deprive the court of the power of doing that which is the end for which it exists—namely, to administer justice duly, impartially, and with reference solely to the facts judicially brought before it. Their tendency is to reduce the court which has to try the case to impotence, so far as the effectual elimination of prejudice and pre-possession is concerned."

to bring that consequence about.[6] Now the question here was whether the lack of knowledge that proceedings were pending was a defence. This question needed to be considered on principle and on the authorities.

On principle, according to Glanville Williams,[7] it would seem that whereas "either simple ignorance or mistake is sufficient to destroy the intentional nature of an act as to an unknown circumstance," mistake will displace recklessness also, but "simple ignorance is not enough to displace recklessness." Dr. Williams does not elaborate on this question in a direction helpful to the case under consideration, but it is submitted that what little he says, which has been quoted, is entitled to respect. Those who publish matter such as this newspaper published may not intend contempt of court, and may not have knowledge of the circumstances of the pending proceedings, but may nevertheless be held reckless in that they must have adverted to the possibility and must be deemed to take the risk of committing contempt of court. This situation is similar to that found in relation to publishing an ordinary libel or an obscene libel, and in the latter connection the similarity between the celebrated *Hicklin* test and the test adumbrated by Lord Goddard in the present case cannot escape attention.[8] This similarity may be regarded by some as further grounds for condemning the rule here adopted, but it is this writer's contention that such a view is fallacious.[9]

The alternative to accepting the decision as based on recklessness is to regard it as based on negligence. The reporter, we are told, had not shown "that standard of care which persons indulging in this kind of journalism are bound to take." Lord Goddard mentions this as his reason for imposing a fine on him, but it might well have been made the basis of the decision. When will the courts learn to formulate the issues before them in terms which are capable of scientific exposition and analysis? And when will they recognise negligence for the purpose of founding criminal liability? Only when, it is conceived, the arguments before them are so based and persuasively advanced.

On the authorities, the respondents may well have grounds to feel that they were harshly treated. The two cases on which they relied for the proposition that lack of knowledge of pending proceedings was a defence were brusquely brushed aside, notwithstanding that they contained quite emphatic acceptance of

[6] Glanville L. Williams, *Criminal Law—The General Part*, 1953, § 19, p. 49. But see *R.* v. *Bates* [1952] 2 All E.R. 842 at 846; and *R.* v. *Russell* [1953] 1 W.L.R. 77, C.C.A., criticised by Glanville Williams, (1953) 16 M.L.R. 234.

[7] *Ibid.*, § 40, p. 123.

[8] See *R.* v. *Hicklin* (1868) L.R. 3 Q.B. 360, at 371.

[9] See the writer's article "Obscenity in Modern English Law," *Law and Contemporary Problems*, Autumn, 1955, pp. 634 *et seq.*

the notion that ignorance of proceedings pending is a good defence.[10] Newspapers may well be alarmed at the situation in which they now find themselves on the basis of the court's decision. This suggests that they may be liable to be convicted of contempt of court if they publish anything which may prejudice criminal or civil proceedings even though it may have been quite impossible for them to find out whether any proceedings were pending. It would clearly be fairer and more just if they were to be held liable only where there was negligence on their part. The result in this case would no doubt have been the same, but it would have been more easily recognised as sound.

J. E. Hall Williams

Recognition of Foreign Divorce Decrees

Mr. Commissioner Latey's decision in *Arnold* v. *Arnold* [1] is to be welcomed as resolving an ambiguity in the judgment in *Travers* v. *Holley* [2] in favour of recognising foreign divorce decrees. As most readers will remember, in that case the Court of Appeal recognised the divorce obtained in New South Wales by the wife at a time when her husband may not have been domiciled there. The New South Wales court had claimed jurisdiction under legislation very similar to that exercised by English courts under section 18 (1) of the Matrimonial Causes Act, 1950,[3] on the basis that the husband had deserted her when he was domiciled within the jurisdiction. Somervell L.J. said, "Although the wording [of the English Act] is different the result for present purposes is the same as the provisions of the New South Wales Act. On principle it seems to me plain that our courts in this matter should recognise a jurisdiction which they themselves claim." But this has led to a doubt aired in Canada [4] and later in England [5] whether it was the foreign rules as to jurisdiction that had to be

[10] *Metropolitan Music Hall Co.* v. *Lake* (1889) 58 L.J.Ch. 513, Chitty J. at 516; *Re The Marquis Townshend* (1906) 22 T.L.R. 340, Collins M.R. at 342. It seems a little unfair to use Romer L.J.'s judgment to undermine the authority of the Master of the Rolls—which is what Lord Goddard does—it is so brief as to be inconclusive on this matter.

[1] [1957] 2 W.L.R. 366.

[2] [1953] P. 246.

[3] Then s. 13 of the Matrimonial Causes Act, 1937.
s. 18—(1) English courts have jurisdiction to "entertain proceedings by a wife . . .
(*a*) . . . if the wife has been deserted by her husband . . . and the husband was immediately before the desertion . . . domiciled in England
(*b*) . . . if the wife is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings . . .

[4] Kennedy (1954) 32 Can.Bar Rev. 359 at 365: Iziegel (1955) 33 Can.Bar Rev. 475 at 477–481.

[5] Russell (1956) 5 I.C.L.Q. 126 at 128–129.

similar to our own to secure recognition for the divorce, or whether it was sufficient that, on the facts, we would have claimed jurisdiction in similar circumstances. If, for instance, a Nevada court were to grant the wife a divorce on the ground of sixty days' residence, would an English court recognise the decree if in fact the wife had resided there for three years or more?

In *Arnold* v. *Arnold* [1] a man, domiciled in England, married a Finnish girl in London in 1922. Soon afterwards they went to Finland to live near her parents, but the husband, in an attempt to lessen their influence, came to England in 1930, and wrote many times asking her to join him in a suitable home. These invitations, which she either ignored or evaded, became less frequent as time went on, but it would appear, though it was not found as a fact, that by English domestic law, it was she who deserted him. By 1932 at the latest, the husband had regained his English domicile of origin.

After the war he managed to trace his wife, but found that in 1940 she had obtained a divorce decree from a Finnish court on the ground that he had deserted her for at least one year. The Finnish court had claimed jurisdiction on the ground that he had deserted her or left Finland after giving her grounds for divorce, and that English courts granted divorce decrees on the ground of desertion. The present action was for a declaration that this divorce had dissolved the marriage in England as well as in Finland under the doctrine of *Travers* v. *Holley*. In other words, was it sufficient that we might have exercised jurisdiction on similar facts, although not on the grounds on which the Finnish court in fact claimed jurisdiction? The learned Commissioner held that it was and granted the declaration asked. The judgment gives rise to certain difficulties.

In *Dunne* v. *Saban* [6] the decree of a Florida court was not recognised, although that court had found that, at the time when the husband was domiciled there in the English as well as the Florida sense, he had deserted her. However, it does not appear to have been argued that we would have claimed jurisdiction in such circumstances under subsection (1) (*a*). Also it seems clear that on the evidence before him Davies J. thought it was the wife who was in desertion.[7] If this is the right explanation of the case, *Arnold* v. *Arnold* conflicts with it if the recognition in *Arnold* was based on jurisdiction under section 18 (1) (*a*), since it seems that, under English law, the husband never deserted her.

This leaves us with section 18 (1) (*b*) to discuss—the wife's residence for three years. In *Dunne* v. *Saban*, although jurisdiction was claimed in Florida on the basis of ninety days' residence, the wife had in fact been resident there for two years. This fact does

[6] [1955] P. 178.

[7] At p. 190 he advises the husband to petition on the ground of desertion. See Russell, note 5, *supra*.

not appear to have been considered by Davies J., but although Mr. Commissioner Latey felt that any substantial period, such as two years, would be sufficient, it seems hard to resist Davies J.'s argument that the line must be drawn somewhere, and where better than the point chosen by our statute? In *Arnold*, however, the wife had been resident in Finland for well over three years, so this point was not necessary to the decision.

The difficulty on subsection (1) (*b*) is that the wife's residence became a jurisdictional ground for divorce in this country only in 1949,[8] nine years after the Finnish decree. It is strange that the learned Commissioner did not advert to this point, because in his judgment he mentioned that this ground was introduced in 1949. In a lecture, published last summer,[9] he discussed the provisions suggested by the Royal Commission on Marriage and Divorce [10] to deal with cases where, between the foreign decree and the commencement of the English proceedings, our jurisdictional requirements have changed. In *Travers* v. *Holley*, both Somervell and Hodson L.JJ. referred to the English Act in force at the date of the foreign decree, and not to the 1950 Act in force at the date of the English proceedings. However, in that case, there was no substantial difference, and no reasons for consulting the earlier Act were given. But if we deduce from *Arnold* that, contrary to this assumption, it is the jurisdictional requirements of the *lex fori* at the date of the English proceedings that must be satisfied, then if our requirements were to become stricter, and not wider as in *Arnold*, divorces valid here at the time they were granted, but not the subject of litigation, might become invalid. This could be avoided by a saving clause in whatever statute might narrow our claims to jurisdiction, but if this were not done, it is to be hoped that the courts would confine this aspect of *Arnold* v. *Arnold* to cases where the English requirements have since been broadened.

This branch of the law seems to be developing rapidly, as three weeks later the Court of Appeal had to consider *Travers* v. *Holley* again—in *Levett* v. *Levett and Smith*.[11] There the wife of a domiciled Englishman commenced proceedings in a German court, but her claim failed or was not proceeded with, and the husband obtained relief on the ground of her adultery. The court refused to recognise the decree granted on the husband's answer, because, even assuming that the wife had been resident in Germany for three years, the answer was not part of the "proceedings by a wife" within section 18 (1). This seems to be a regrettable construction of the section. Suppose the wife of a man not domiciled in England brings proceedings here under section 18 (1); if the husband wants his marriage dissolved, he will either have to admit

[8] Law Reform (Miscellaneous Provisions) Act, 1949, s. 2.
[9] "Jurisdiction in Divorce and Nullity" (1956) 5 I.C.L.Q. 499 at 505.
[10] 1956 Cmd. 9678. para. 582 *et seq.*
[11] [1957] *The Times*, February 15; [1957] 2 W.L.R. 484; [1957] 1 All E.R. 720.

her claim, possibly false, and be liable for costs, or else bring divorce proceedings before the courts of his domicile, causing costs and inconvenience to both parties.[11a]

In all the cases so far, the husband has been domiciled in England, so it has not been necessary to decide whether the courts have looked to the English jurisdictional requirements as being those of the domicile or of the forum. The latter seems to be assumed by some writers, but it is submitted that the former is more desirable.[12]

In this rapidly developing branch of the law, *Arnold* v. *Arnold* is to be welcomed as settling an ambiguity in the judgments in *Travers* v. *Holley* in favour of recognising the foreign divorce. But we can expect many more cases before all the points raised by that decision have been settled.

V. L. KORAH.

MATRIMONIAL PROPERTY—THE SCOPE OF SECTION 17

Two recent decisions have added some precision to the limits of the discretion which the courts are prepared to exercise when a husband or wife applies under section 17 of the Married Women's Property Act, 1882, which provides: "In any question between husband and wife as to the title to . . . property, either party . . . may apply . . . in a summary way . . . and the judge . . . may make such order with respect to the property in dispute . . . as he shall think fit. . . ."

Fribance v. *Fribance* [1] demonstrates some extension of the power exercised in *Rimmer* [2] to divide equally between the spouses property bought in the husband's name. The decision also marks a retreat, foreshadowed in several recent cases, from suggestions made earlier that, in deciding questions as to the title to property between husband and wife, the courts should exercise a discretion wide enough to take account not only of the legal title and beneficial interest of the parties in the property, but of their general behaviour towards each other.

It is extraordinary that the decision in *Rimmer* should have been both welcomed and attacked on the grounds of novelty. The actual decision (apart from some of the dicta) was in fact novel only in retreating, as far as the rights of a married woman to the proceeds of property bought with her money are concerned, from the equitable presumption in favour of the purchaser, which

[11a] This conclusion has since been drawn by Sachs J. in *Russell* v. *Russell and Roebuck* [1957] 1 All E.R. 927 at 933–936.

[12] (1955) 33 Can.Bar Rev. 514 and 516 *et seq.*

[1] [1957] 1 All E.R. 357, C.A., of Denning, Hodson and Morris L.JJ., later reported in [1957] 1 W.L.R. 384.

[2] [1953] 1 Q.B. 63.

normally favours the husband. Former decisions of the courts [3] had established that, of the two equitable presumptions alleged to be operative in questions of title to property between a husband and wife, the presumption in favour of the owner of the purchase price had gained such an ascendancy as virtually to oust from consideration the presumption of advancement of a wife by her husband. In *Rimmer*, the wife had contributed £309 from her own earnings towards the purchase of the matrimonial home, as compared with the husband's contribution of £151, but she had been able to do so only because she had (with a foresight that may not always be conducive to domestic bliss) expended her husband's housekeeping allowance on her own maintenance, and invested her own earnings in contributions towards the purchase of a matrimonial home (albeit one to which her husband had the legal title) which in twenty-three years appreciated to almost five times its original value. The application of the traditional presumption in favour of the provider of the purchase money resulted, in the peculiar facts of that case, in the decision of the registrar at first instance, that the wife was entitled to two-thirds and the husband to one-third of the proceeds of sale of the house. The decision (on appeal to the county court judge) that division of the proceeds of sale should be not in proportion to the provision of the purchase price, but in proportion to the legal obligation to provide it, was contrary both to precedent and to the underlying basis of the equitable presumption. It was in this situation, and faced with such a decision in the county court, that the Court of Appeal delivered its judgment, the only novelty of which was the enunciation of the principle that, when both parties to a marriage have a substantial beneficial interest and it is not possible *or right* [4] to assume some more precise calculation of their shares, equality almost necessarily follows.[5]

In the earlier decision of *Newgrosh* v. *Newgrosh* [6] the Court of Appeal emphasised the wide discretion conferred on the court by section 17 to do what the court thought fair and just in the circumstances in respect of property used in the matrimonial home. In *W.* v. *W.*[7] Devlin J. again emphasised the unfettered nature of the judge's discretion, and in deciding that a husband was entitled to the return of furniture in which he had the undoubted legal title, he stressed the circumstances: (1) that both parties were responsible for the fact that the husband had left the home, (2) that the wife did not need the furniture in question and, (3) that

[3] *Birkett* v. *Birkett* (1908) 24 T.L.R. 284 and 98 L.T. 540; *Montgomery* v. *Blows* [1916] 1 K.B. 899; *Blackwell* v. *Blackwell* [1943] 2 All E.R. 579; *Hoddinott* v. *Hoddinott* [1949] 2 K.B. 406.

[4] *Sic.* There is room for speculation as to what mental calculations might be covered by this reservation.

[5] See Evershed M.R. [1953] 1 Q.B. 72 and *cf.* Denning L.J. *ibid.*, p. 74.

[6] (1950) 100 L.J. 525.

[7] [1951] 2 T.L.R. 1135.

the husband did need it and was not acting vindictively in asking for its return. But dicta in *Rimmer* [8] evidenced a retreat from the doctrine that the behaviour of the parties was a consideration relevant to questions of title to property. In *Hickson* v. *Hickson* [9] the Court of Appeal held that allegations of adultery by the wife could have no bearing on the question of fact as to the ownership of property, and in *Cobb* v. *Cobb* [10] Romer L.J. repeated [11]: "I know of no power that the court has under section 17 to vary agreed or established titles to property. It has power to ascertain the respective rights of husband and wife to disputed property, and frequently has to do so on very little material; but where, as here, the original rights to property are established by the evidence, and those rights have not been varied by subsequent agreement, the court cannot, in my opinion, under section 17 vary those rights merely because it thinks that in the light of subsequent events the original agreement was unfair." This principle was cited and applied in *Fribance* by both Denning L.J. and Morris L.J. The courts have thus turned their backs on the variation of property rights as a sanction for bad matrimonial behaviour,[12] and as always, decisions are reached in a contest between husband and wife, without regard to the interests of their children.

In *Fribance*, as in *Rimmer*, both husband and wife were wage earners, but the facts of *Fribance* differed from those in *Rimmer* principally in that (1) at a time when the husband was in a position to increase the allowance formerly made for the maintenance of his family, he and his wife agreed by correspondence (which was apparently in evidence) that instead, the wife should take paid employment so that she could herself contribute towards the maintenance of herself and the children, with the specific object that the husband should save for the future use of the family as a whole the money he could otherwise have provided for their maintenance, and (2) the wife was so much less well advised as to her legal position than the wife in *Rimmer* that instead of standing upon her husband's legal obligation to maintain herself and her children, and investing her earnings in property she could claim in the event of any future friction, she used her earnings to defray household expenses and provide clothing for the children, and invested only £20 in the purchase of the lease in the matrimonial home. In these circumstances the court applied the *Rimmer* principle and held that both parties had an equal interest in the house.

[8] See *e.g.*, Evershed M.R. [1953] 1 Q.B. 68, quoting Bucknill J. in *Newgrosh*; and again p. 71; Romer L.J. *ibid.*, pp. 75–76, Denning L.J., p. 73.

[9] [1953] 1 Q.B. 420, especially Morris L.J. pp. 423 and 427; Roxburgh J. p. 427.

[10] [1955] 1 W.L.R. 731.

[11] At pp. 736–737, and *cf.* Denning L.J., p. 734.

[12] It may be, however, that these opposing principles disclose merely the ancient cleavage between the approach to title to chattels on the one hand and to title to realty on the other. See *e.g.*, Devlin J. [1951] 2 T.L.R. 1136.

The present position would therefore seem to be as follows:

(1) If a married woman invests her own money, whether acquired from earnings or inheritance or in any other way, in real or personal property in her own name, the property is hers, although she might not have been able to buy it unless her husband had been maintaining her during the period of investment. If, however, the property is purchased in her husband's name, she will be put to proof of her beneficial interest, and if both parties provided some of the purchase money, and the extent of their beneficial interest is difficult to establish, there may be an equal division between them: *Rimmer.*

(2) If she invests her money in the maintenance of the family and allows her husband to retain control of the money which he would otherwise have been obliged to expend for its maintenance, she may yet establish a beneficial interest in the property he buys with such savings, provided she can prove an agreement between them that she should so enable him to purchase property for the benefit of the family as a whole: *Fribance.*

(3) It seems that if she cannot prove such definite agreement, she will have no claim to property in which her husband invests his savings.

(4) If she devotes all her attention to looking after the household, and has no money except what her husband allows her for the maintenance of the household, she can lay no claim to property in which he invests his savings or in which she invests savings from the housekeeping allowance: *Blackwell* and *Hoddinott* are, in these circumstances, unmitigated so far.

The property rights summarised in (1) and (2) above are distinct from any right a wife may have, if deserted, to remain in possession of the matrimonial home unless the husband sells or mortgages it to a third party in good faith without notice of her equity, and to her right to apply for maintenance under the Matrimonial Causes Act, 1950.

The other recent decision, in *Re Camkin's Questions*,[13] is principally noteworthy for the application of a previous decision of the Court of Appeal[14] without reference to the disapproval of this decision expressed by the Royal Commission on Marriage and Divorce.[15] In *Camkin* a summons was taken out under section 17

[13] [1957] 1 W.L.R. 255.

[14] *Tunstall* v. *Tunstall* [1953] 1 W.L.R. 770, C.A. of Lord Goddard C.J., Birkett and Hodson L.JJ.

[15] Cmd. 9678, para. 601: "It was the absence of a fund that was held to distinguish this case from that of *Rimmer.* To reconcile the two cases, however, it has to be assumed (though this does not appear from the report of the judgment) that the balance of the proceeds of sale in the husband's hands in the case of *Tunstall* was not identifiable amongst such other money as he possessed. If so, then jurisdiction under s. 17 will depend upon what has happened to the proceeds of sale when proceedings are begun. If they are in the hands of, say, a bank or a solicitor or if they have been spent on the purchase of some identifiable asset, there would be jurisdiction, but if the proceeds have been so dealt with that it is not possible to distinguish them,

by the executors of a deceased wife, to decide questions as to the ownership or possession of some chattels and sums of money allegedly due from the wife's estate to the husband, and from the husband to the wife's estate. Wynn-Parry J. held, following *Tunstall*, that section 17 has no application to a case in which it would be necessary to decide whether there is any property, and only applies to cases where it can be postulated at the beginning of the consideration of the summons that there is property. Where there is nothing but an alleged debt owing by the husband to the wife, then there is no property upon which section 17 can operate. The Royal Commission on Marriage and Divorce said in this connection: "The case of *Tunstall* has shown that it would be desirable that the court should be able to order one spouse to pay the other spouse a sum of money in compensation for the loss of an interest in property to which that other spouse has been able to establish a title, and we recommend accordingly." [16] In view of the somewhat unmanageable volume of evidence [17] and the vagueness of the questions before the court, however, Wynn-Parry J. said [18]: "The difficulties to which I have adverted would be very considerably mitigated, if not entirely removed, if power were given to the master similar to the power given to the registrar under the Companies Act of 1948 which allows him, in the case of a misfeasance summons involving substantial or complicated questions, to direct points of claim and defence, and to make a full order for discovery. When such a procedure is adopted, the matter follows the course of a witness action and, apart from any preliminary affidavits, the evidence is given orally and thus (a) the issues are defined, and (b) evidence emerges in a form which makes it far easier to follow and assess." In a really complicated case such as the present one, this would probably be a most desirable reform.

O. M. Stone.

To Speak or not to Speak

There are contenders for the view that the British Empire was acquired as a result of absence of mind, and was lost when we became fully conscious of what was involved in imperialism. So too it may be maintained that the development of the common law took place without design, and a programme of expansion ended when judges became fully aware of what was involved in

then there would be no jurisdiction under s. 17, since the court has no power under that section to order one spouse to pay the other spouse a sum of money in compensation for the loss of property to which that other spouse has successfully proved a title."

16 Cmd. 9678, para. 705.

17 There were twenty-three affidavits and thirty-four exhibits.

18 [1957] 1 W.L.R. 257.

judicial legislation. Perhaps this explains the present attitudes of the House of Lords, and the fact that, while the legal principles which Denning L.J. advocates are so often adopted, the policy of conscious recognition of the factors involved in arriving at these principles, which makes him an (unconscious?) disciple of Cardozo, is so often repudiated.

We live in a climate of opinion favourable to the development of administrative law, yet the judges who one feels are most opposed to administrative lawlessness are often those whose decisions constitute a refusal to extend judicial control of administration. Development however may occur unconsciously! The case of *R.* v. *Agricultural Land Tribunal for the Eastern Province, ex p. Grant* [1] may mark one such important development. It was laid down as clear law in *R.* v. *Northumberland Compensation Tribunal, ex p. Shaw* [2] that certiorari only lay to quash the order of an administrative tribunal for error of law, where such error appeared on the face of the record of the tribunal. If the tribunal made no statement about the law it applied in coming to its decision then the order could not be quashed, despite the existence of evidence from which it might be inferred that in actual truth the tribunal had relied on an erroneous view of the law. In *Ex p. Grant* we may have the beginning of a procedure requiring tribunals to state their legal reasoning.

The landlords of an agricultural holding of sixty-three acres, on which tenants carried on market gardening, were themselves farmers of some eleven hundred acres of adjoining land. They gave the tenants notice to quit in order to farm the lands themselves, alleging that they brought themselves within section 25 (1) (*a*) of the Agricultural Holdings Act, 1948, since they could establish "that the carrying out of the purpose for which the landlord proposes to terminate the tenancy is desirable in the interests of efficient farming, whether as respects good estate management or good husbandry or otherwise." Their contention was that they could farm the sixty-three acres more efficiently than the tenants were farming it. The tenants themselves also had additional land to the extent of some 220 acres about half a mile away and they contended that by losing the sixty-three acres the efficiency of farming of the 220 acres would be reduced. The Agricultural Land Tribunal who considered the matter decided in favour of the tenants, making a speaking order in which they accepted the view that they were entitled under section 25 (1) (*a*) to take note of the tenants' contention. "The tribunal formed the opinion that any increase in production resulting therefrom would not offset the adverse effect the loss of these sixty-three acres would have on [the tenants'] total holding of 280 acres." The Court of Appeal, however, held that the Land Tribunal was wrong in being influenced by this

[1] [1956] 1 W.L.R. 1240; [1956] 3 All E.R. 321. [2] [1951] 1 K.B. 711.

consideration, for in their view of section 25 (1) (*a*), to quote the words of Singleton L.J., "the words 'in the interests of efficient farming' should be read as meaning 'the efficient farming of the land in respect of which the notice is given'." In adopting this interpretation of the section they followed the Divisional Court's ruling in *R.* v. *Agriculture Land Tribunal for the Wales and Monmouth Area, ex p. Davies.*[3]

Thus the court affirmed the decision of the Divisional Court, which had quashed the order of the Land Tribunal and ordered the Tribunal to hear and determine the reference according to law. The Lords Justices moreover gave specific directions to the Tribunal how it should determine the matter "according to law." Thus Singleton L.J. said: ". . . the case must be reheard. It will then be the duty of the Tribunal to consider [section 25 (1) (*a*)]. It will be entitled to bear in mind the quality of the farming of the landlord. It will ask itself whether it is satisfied that it is desirable that consent should be given in the interests of efficient farming, and it will be entitled to bear in mind the position of the landlord's present holding and farm buildings in relation to the land, which must, I think, have a bearing on the efficient farming of this piece of land. If it comes to the conclusion that it is satisfied that the requirements of subsection (1) (*a*) are fulfilled it will ask itself whether or not, in its discretion, it should give its consent to the notice. On the question of discretion it appears to me that the first question is really the public welfare." In view of this judgment it is fairly clear that the Land Tribunal in its new order will expressly deal with these points. At present there is no judicial determination that mandamus to a tribunal can compel the tribunal to draw up a speaking order. But may this not come? And can there be a "determination according to law" by the tribunal unless the record of the tribunal shows that it has so determined?

J. L. MONTROSE.

DUTIES OF NON-OCCUPIERS

IN his *Law of Torts*, Street suggests that the cases of *Malone* v. *Laskey*[1] and *Ball* v. *L.C.C.*[2] were wrongly decided, and are inconsistent with *Haseldine* v. *Daw & Sons, Ltd.*[3] His suggestion

[3] [1953] 1 All E.R. 1182

[1] [1907] 2 K.B. 141.

[2] [1949] 2 K.B. 159. Denning L.J. says that "the decision can be explained perhaps on the ground that the landlords' negligence was not the cause of the injury" ([1957] 1 Q.B. at p. 57), and that the cause was as Tucker L.J. had said in *Ball's* case "the ill-advised action of [the plaintiff] in lighting the boiler when the pipes were frozen." But Street is right when he states that "the decision against her did not rest on that ground." The *ratio decidendi* of each of the judges was solely the principle of *Malone* v. *Laskey*. The dictum of Denning L.J. testifies to the survival of a theory that cases can be "explained" by reference to principles on which the judges did not rely.

[3] [1941] 2 K.B. 343.

has now been confirmed by *Riden* v. *A. C. Billings and Sons, Ltd.*[4] which differs only from the above cases in that it is concerned with acts done to buildings themselves, whereas they were concerned with fixtures attached to buildings. This distinction is very properly disregarded by Denning L.J., who, treating all the cases as concerned with doing work on premises, once again embellishes the reports with a judgment remarkable alike for its learning, its sagacity, and its excellence of exposition. Street is indeed to be congratulated for his referring to a case omitted by Denning L.J.: *Travers* v. *Gloucester Corporation*.[5] He may also be congratulated by some for his caution in saying "Until this point has been considered by a higher court, it is perhaps premature to make the generalisation that the broad principle shall always apply so as to impose a general duty of care on licensees or other non-occupiers of land to persons on the land." Denning L.J. has no hesitation in laying down the principle that "a contractor doing work on premises is under a duty to use reasonable care to prevent damage to persons whom he may reasonably expect to be affected by his work." On this point there was agreement by both his brother judges, Birkett L.J. and Roxburgh J.

The points in *Riden's* case can be summarised thus. Contractors were employed to carry out alterations to the entrance to a house on the top floor of which there was a flat. The alterations took more than one day, and during the evening of the first day the entrance to the house was left in an unsafe condition. Visitors to the residents in the flat managed to get in safely during daylight, but on leaving at night the plaintiff was injured. The defence was twofold: (i) there was no duty at all to the plaintiff; (ii) the duty was no more than to warn of danger, and a warning was not required since the plaintiff had knowledge of the danger.

The first defence was based on *Malone* v. *Laskey* and was rejected by all members of the court. Denning L.J. went further than his brother judges and in a dictum stated the duty of contractors as part of a general activity duty, applicable to occupiers as well as non-occupiers of land. "The duty of care of which I have spoken is not confined to contractors. It is a duty which rests on anyone who does work on the land, including the occupier himself. If the occupier does work on his own land, he is under the same duty as a contractor." He cites *Dunster* v. *Abbott*[6] and *Slater* v. *Clay Cross Co.*[7]

The second defence was accepted by Roxburgh J. It was rejected by Birkett L.J. as inconsistent with *Clayards* v. *Dethick and Davis*.[8] Denning L.J. also relied on that case, but showed that it illustrated the general principle of *Smith* v. *Baker and*

[4] [1957] 1 Q.B. 46; [1956] 3 All E.R. 358.
[5] [1947] K.B. 71.
[6] [1954] 1 W.L.R. 58: discussed (1954) 17 M.L.R. 265.
[7] [1956] 2 Q.B. 264: discussed (1956) 19 M.L.R. 691.
[8] (1848) 12 Q.B. 439.

Sons,[9] whereby a distinction is to be drawn between *scientia* and *volentia*. True the plaintiff knew of the danger, but he neither fully appreciated nor was completely free to avoid it. The Lord Justice had found himself confronted by counsel with his own dictum in *Hawkins* v. *Coulsdon and Purley Urban District Council*[10]: "A licensee can never complain of dangers which are obvious or known to him," and had to do some explaining. He did so saying, "I must explain that those words only apply where the visitor has full knowledge of the nature and content of the danger . . . and is entirely free to avoid it, but nevertheless voluntarily goes on and is injured."

Roxburgh J. differed on the facts since he thought the plaintiff was *volens* and not merely *sciens*: she knew the facts which constituted the danger, and "she was free to act in a number of ways which would have avoided the danger." But he also differed on the law. In his view a warning of the facts constituting the unusual danger would have been sufficient, and the warning was not required when the plaintiff already knew of the danger. But the majority view was that a warning was not necessarily sufficient. Roxburgh J. said: "If the first defendants had put up a sufficiently illuminated notice on the path reading 'Front entrance closed, entrance by back door' they would, in my view, have discharged their whole duty to persons visiting the premises." Denning L.J. agreed that a notice "Danger, Keep Out . . . might in some circumstances be a sufficient fulfilment of the duty of care to visitors since visitors have no right to a particular mode of access." What is implied here is that the notice must have the effect of giving those who see it full freedom to avoid the danger, but the precise character of the danger need not always be specified. A plaintiff is *volens* who fully appreciates the existence of some danger and freely incurs the risk created by it; he does not have to have full appreciation of the details of the danger. He cannot say he misjudged the character of the risk; for example, it would be no defence to say that he thought he would be exposed to the risk of a minor injury rather than a major injury, unless he was misled about the character of the danger. On the other hand, the view of Roxburgh J., that where there is a duty to take care it is sufficient to give warning, is wrong in principle. An ineffective warning is no warning. A warning may be ineffective because it is given in such a way that it is not reasonably likely to be perceived: it will not then create *scienter*. It may also be ineffective if given in such circumstances that it is not reasonably likely to be acted on: such circumstances exist where it is directed to persons who could not reasonably be expected to alter their proposed course of conduct because of the warning: it will not then create *volentia*.

Though the majority judges thought that the defendants were at fault they found that the plaintiff was equally to blame, and

[9] [1891] A.C. 325.

[10] [1954] 1 Q.B 319

so awarded her only one half the assessed damages. As Denning L.J. pointed out, this was in accord with the recommendation of the Law Reform Committee in regard to occupiers. He added that "Contractors should be in no different position." This recommendation of the Law Reform Committee has now been embodied in the Occupiers' Liability Bill.

J. L. Montrose.

The Problem of the Policeman's Pay—The German Approach

The decision of the Court of Appeal in *Metropolitan Police District Receiver* v. *Croydon Corporation*,[1] to which Professor Gower shortly referred at the end of a recent Note,[2] will no doubt be discussed by a greater expert in the field than this writer. The latter merely desires to draw attention to the curious fact that a problem which might be expected to have been settled long ago is at this very moment the subject-matter of intensive discussion not only in this country, but also in Germany, where according to section 616 of the Civil Code the employer is under a duty, for a period of six weeks, to continue to pay remuneration to an employee who, as a result of an accident, is incapacitated.

The German law relating to unjustified enrichment is greatly developed and, indeed, elaborate. Yet no one seems to have considered it possible to argue that the employer who has paid remuneration to the employee could possibly recover it from the wrongdoer responsible for the accident on the ground of unjustified enrichment. Under German law such a claim presupposes that the defendant has obtained a benefit without legal cause at the expense of the plaintiff. Since the plaintiff pays the employee in discharge of a statutory obligation of his own, it is obvious that no *condictio* can lie against the wrongdoer, though in an economic sense the latter's liability towards the employee is reduced to the extent of the employer's payment. This is very much in line with the reasoning of the Court of Appeal. It is perhaps not free from doubt whether the instant case justified Professor Gower's demand for "some intelligible general principles relating to quasi-contract, restitution, unjust enrichment or whatever they prefer to call it."

On the other hand no one in England seems to have had any faith in the method of approach which, for the time being, has led the German courts to a decision in favour of the employer. In 1952 the Federal Tribunal held (BGHZ 7,30) that the employer, while unable to claim damages in his own right, was entitled to them as assignee of his employee who was considered to be under a duty to execute the requisite assignment. This view was in 1956 reaffirmed by a further decision of the Federal Tribunal (BGHZ

[1] [1957] 2 W.L.R. 33; [1957] 1 All E.R. 78.
[2] (1957) 20 M.L.R. 57.

21,112). Both cases provoked much academic discussion: see, in particular, Siebert in *Festschrift für H. Lehmann* II, 670 with further references. They rest on reasoning which is so involved that it cannot be followed readily. It certainly cannot be summarised in these pages. The basic point would seem to have been that the employee, having received his wages, has not suffered any damage and therefore has no claim that he could assign to his employer. The German courts, however, regarded this argument as "conceptualist" and as irreconcilable with realism and justice. Their main *ratio decidendi* was that the employer who continues to pay remuneration renders, according to the legislator's intentions, a social service. This may be correct, but it involves a *non sequitur* to conclude that therefore the wrongdoer must indemnify the employer who sues as assignee of the employee. Such a claim could succeed only if the employee, when making a claim against the tortfeasor, would not have to give credit for the remuneration received by him, if, in other words, the employee could receive his remuneration twice and thus make a profit from, rather than obtain damages for, the accident. It remains to be seen whether the German courts will draw so logical a conclusion from their doctrine. Probably they will regard it as "conceptualist." The present jurisprudential tendencies of German courts are by no means free from danger or wholly felicitous: the boundaries between the interpretative and the creative functions and powers of courts are sometimes being ignored.

It is no doubt true that the result reached in Germany is more satisfactory. To this extent it is possible to agree with Professor Gower that "it is anomalous that the damages which the tortfeasor has to pay should be reduced because the man injured happened to have a generous employer or one who is under an obligation to pay wages notwithstanding absence through injury." Merit in itself, however, is an inadequate guide to legal decision. The truth of the matter is that, as the Court of Appeal decided, the employer's damage arises, not from the payment of remuneration, but from the loss of the employee's services. German law does not know an action *per quod servitium amisit*. Hence German courts should perhaps not introduce it circuitously. English law, as it stands since *Inland Revenue Commissioners* v. *Hambrook*,[3] has severely circumscribed and perhaps even eliminated the employer's right to recover damage suffered as a result of the loss of the employee's services. It may well be that an action for loss of service is not so anomalous as it is at present fashionable to think; that, on the contrary, it is, within certain limits and for certain purposes, a useful weapon which might have been developed and adapted to modern conditions rather than discarded. The whole subject would be worthy of a monograph on a broad comparative basis.

F. A. Mann.

[3] [1956] 3 W.L.R. 643; [1956] 3 All E.R. 338.

REVIEWS

The Challenge of Law Reform. By Arthur T. Vanderbilt. [London: Oxford University Press. 1955. vii and 194 pp. 28s. net.]

Chief Justice Vanderbilt is one of the most distinguished of the not inconsiderable number of American jurists who have combined experience and distinction in the world of law teaching with that of practice and high judicial office. Such men as Stone, Frankfurter, Vanderbilt, Roberts, Clark and others have not only added to their own stature by the combination of academic and practical experience in eminent positions. What is, perhaps, more important, they have immensely added to the development and stature of American law. In this respect, English lawyers might well look with envy to the United States, for in the United Kingdom, at least—though far less so in some of the British Dominions—the separation between the practical and the academic side of the legal profession is unfortunately still regarded as fairly rigid.

The present small book is evidence of a felicitous combination of theoretical learning and academic experience with active responsibility for the administration of justice. When Dean Vanderbilt of the New York University School of Law became Chief Justice of New Jersey in 1948, that State—small in territory but fifth in population, and the second most industrialised State of the Union—had long, in the sorry company of the majority of the other forty-seven States, left its administration of justice in a deplorable state. Although one of the few States in which judges were appointed, not elected, its procedure had become tardy and cumbrous, with delays of two, three or even four years in handing down decisions, a common experience.[1] In 1947, the State of New Jersey "over the opposition of all but a handful of judges and lawyers, and without any support of a single Bar Association, . . . adopted a new Constitution by a vote of 3½ to 1 creating a streamlined judicial establishment."

The story of this book is largely a concise account of the judicial reforms effected in the last six years following the adoption of the new Constitution in New Jersey. It is, however, flanked by an introductory Chapter on the basic deficiencies of the American judicial system, and a concluding Chapter on the need for substantive law reform.

Like the great majority of the leaders of the American legal profession, Chief Justice Vanderbilt is strongly opposed to the elective system which prevails in the great majority of the States. This goes back, as he points out in a brief historical sketch, to the Jacksonian egalitarian revolution against aristocracy and any form of entrenched power, a revolution strengthened by the decision in *Marbury* v. *Madison,* by which the Supreme Court claimed the power to judge the constitutionality of Congressional statutes. The almost universal change-over from an appointed to an elective system—except for the Federal Judiciary—is one of the most unfortunate products of a misunderstood conception of democracy. Today, *all* judges are elected in thirty-six States (by popular vote). In four States judges are selected by the legislature; in five, they are appointed by the Executive, subject to confirmation;

[1] According to figures gathered in 1954 by the Institute of Judicial Administration at New York University, a jury case has to wait from 37 to 49 months in different densely populated counties of New York State. In many other States, delays are not much less.

in two States, Appellate Judges are appointed, while the others are elected; in one, Trial Judges are appointed by the Executive, and the other judges by popular or legislative vote. In the State of New York, the elective system was introduced in 1846, and it still prevails. It is, on the whole, a sorry farce of democracy. It has become entirely a matter of political party manipulation. Every now and then a populace, indifferent to or ignorant of the qualities and often even the names of the judges elected as much by default as by positive vote, chooses its judiciary. A mitigating factor is that a considerable proportion of judges are appointed by the Executive between terms, as vacancies occur, and often retain their position by election. Altogether, as Chief Justice Vanderbilt and many others put it, it is a wonder that with such a system, there are as many good judges as do, in fact, hold office. At the same time, there is no question in the mind of any serious student of the American legal scene that the elective system has, on the whole, debased the average quality of the American judiciary, and that it enmeshes the judge deeply in the intricate and often unsavoury game of party politics. More than once, Chief Justice Vanderbilt points with envy to the methods of appointment and the general professional standing of the British judiciary.

However, the chief interest of the book does not lie in the attack on the deficiencies of the methods of appointing judges (and, indeed, juries, which, in the United States, still play an excessively large part, especially in civil cases), but in the concrete proposals for the improvement of the administration of justice against the background of New Jersey experience. Not all the reforms for which Chief Justice Vanderbilt has mainly been responsible and of which he is the principal executant in New Jersey, will be to everybody's taste. They involve a degree of discipline over the judges which might well be resented by those who have strong views on the complete and (at least, in the British tradition) august independence and aloofness of the judge. There is, however, little doubt that, in the balance, the gain in efficiency greatly outweighs certain dangers of administrative policing. The gist of the New Jersey reform is the simplification of the judicial system, now consisting of three levels of courts: a local court of limited civil and criminal jurisdiction, a trial court of general State-wide jurisdiction, and an appellate court or courts. Another aspect of the reform is emphasis on specialisation. Judges are assigned to the kind of traditional business in which they excel. As Chief Justice Vanderbilt puts it: "Some very good trial judges shudder at the thought of opinion-writing, some very good equity judges shrink from working with the jury. . . ."

Third and, perhaps, most important of all, there is strict supervision by the Chief Justice and his deputies on the equalisation of burden between the different courts. Weekly reports are submitted on the cases despatched, on the list, and even the hours spent on the Bench.[2] Another most important reform is the creation of an administrative office which assists the Chief Justice in the exercise of his administrative functions. This office, under an administrative director, receives and analyses the weekly reports which come from all the courts of the State, and prepares summaries for the Chief Justice and the associate Justices of the Supreme Court. As a result of these reports, judges are often transferred from one division to another. The office also handles fiscal and business affairs and is responsible for public relations. It deals with proposals, complaints, requests, that come from the public, laymen and lawyers alike. The administrative Director also acts as Secretary to the Judicial Conference, which takes place regularly.

A mere streamlining of administration would not help, especially in the

2 This would, perhaps, be more unacceptable than any other aspect of the New Jersey reform for British judges, but we must not forget the different tradition and standing of the British judiciary. The Federal judiciary, appointive, and generally preferred to state posts despite lower salaries by the ablest lawyers, comes nearest to the British judiciary in standing and public esteem.

clearing up of backlogs and excessive delays, without a reform of procedure. The most important aspect of the procedural reform introduced in New Jersey, and in some other States, is the pre-trial Conference, which is mandatory. At these pre-trial Conferences, the plaintiff and the defendant set out what they expect to prove at the trial, the court then explores what facts may be admitted, states the issues to be proved, and dictates a summary. These preparations not only greatly shorten the average trial, but also lead to a very high proportion of settlements before trial. The pre-trial Conference takes place in open court, and, after an initial attempt to send junior lawyers, the parties, especially insurance companies, have found it advisable to send their chief counsel to these conferences. The net result of these and many other reforms is that the backlog in New Jersey has been virtually eliminated. The chief merit of the pre-trial Conference is obviously that it does away with the often excessively long and irrelevant statement of issues and unnecessary evidence which, otherwise, would take place at the trial itself. In some ways, this approximates to Continental procedures where far greater stress is laid on the preparation of the trial than on the trial itself, which, indeed, in many cases is only a formal one. There is no doubt that New York, with backlogs of years and a judiciary deeply enmeshed in politics, must look with some envy upon the reforms of neighbouring New Jersey.

Chief Justice Vanderbilt concludes this stimulating series of lectures—particularly informative for the non-American common law jurisdictions—with a short chapter on the need for the modernisation of the law. The present reviewer heartily agrees with the learned author's criticism of the excessive contemporary emphasis on case books and collection of materials, and the dearth of textbooks of the calibre of the writings of Williston, Corbin, Wigmore, Pound, Scott and Bogert—not to speak of the far larger number of great textbooks written in the last century. There is no doubt that only a major treatise, not a collection of cases and materials however intelligently edited can break new ground and pave the way for significant developments in the law. One need only think of Wigmore's monumental treatise on Evidence or Keener's book on Quasi-Contracts or the many pioneer writings of Dean Pound which influenced an entire generation. Chief Justice Vanderbilt is critical of the achievements of the Restatements which have declined from their original objective, and are at any rate not a substitute for a major academic treatise. He concludes his book by calling upon the law schools to form the centres for active and systematic preparation of the reform of the law, more desperately needed than ever at the time when the uncontrollable flood of precedents and statutes threatens to drown the chief features of the legal system in a mass of uncoordinated and undigested material.

W. Friedmann.

A History of The School of Law Columbia University. By the Staff of the Foundation for Research in Legal History under the direction of Julius Goebel, Jr. [Columbia University Press; London: Cumberlege. 1955. viii and 511 and (index) 12 pp. £2 8s. net.]

No topic has been more neglected by English academic lawyers than the subject of legal education, so that we still lack an authoritative work on the subject by an English lawyer. Perhaps this a reflection of a more important omission, the absence of any theory of legal education in this country. The role of both academic lawyer and law school remains undefined and apart from the *Journal of the Public Teachers of Law* no sustained thought has been devoted to the part legal education has to play in legal life. American lawyers have not

been so dilatory, and this volume, part nine of the nineteen-volume bicentennial history of Columbia University, is a further valuable contribution to the imposing edifice of educational research that has been industriously erected by American lawyers over the past quarter of a century.

When King's College—the direct ancestor of Columbia University—was founded in New York in 1754 no one thought of including law in the academic curriculum. Law, it was generally agreed, was a technique to be acquired in an attorney's office, a view shared by the mother country, where the common law was neglected by both universities. Blackstone's famous lectures of 1753 were in essence a private enterprise, the Inns of Court had long ceased to provide the legal instruction which had made them famous, and England possessed no university law school where students might learn the fundamental principles of the common law. Blackstone's lectures, however, proved so successful that in 1758 he was elected to the first chair of common law created by the munificence of the legal scholar Charles Viner. Nearly forty years later, in 1793, Columbia followed suit by electing James Kent to a professorship of law at a salary of £200 per annum plus "scholar perquisites," which were estimated at about the same sum. Kent had a high ideal of the lawyer he was to produce. He was to be of "irreproachable virtue and goodness," "well read in the whole circle of arts and sciences," able to "govern the commonwealth by his councils (*sic*), establish it by his laws, and correct it by his example." To form this paragon Kent envisaged a law course of the most liberal character, including not only a study of the municipal law of New York, but a course in political philosophy and the constitutional and political history of the United States. He began modestly with two lectures a week but was disappointed by an audience of only seven students and thirty-six gentlemen, most of whom did not belong to the college. By November, 1795, the numbers were down to two and in the following year there were none! Discouraged, Kent resigned, but the trustees ignored his resignation and conferred on him instead the honorary degree of Doctor of Laws. In 1798, however, he was appointed a judge of the New York Supreme Court and on this occasion his resignation was successful. Kent had failed to create a law school partly because his interests as a practising lawyer and active politician prevented him from devoting his full energies to academic work, but there was a more fundamental reason. The lectures were too professional for arts students and too academic for apprentices and failed to attract either. This fundamental problem thus emerged at the outset of the school's history, and it is no exaggeration to say that it has dominated it ever since.

No further advance occurred until 1857, when a radical reorganisation of the syllabus took place. Three years general "college" work was to be followed by a "university" course in either "Letters," "Science" or "Jurisprudence." One year's study secured the Bachelor's degree, and a further two years that of Master of Arts. In 1858 Theodore Dwight was appointed to the vacant chair of law. His view of the law school's function was simple. An office legal education filled the student's mind with a heterogeneous jumble of isolated legal rules; the law school existed to discipline this chaos by the inculcation of fundamental legal principles. "Principles before practice" was his watchword, and the textbook, not a study of cases, the basis of his teaching system. A man of broad and liberal views, he insisted that every lawyer should have some outside useful or public-spirited interest to supplement his work. He set a good example himself by taking part in every form of state charity, interesting himself in penal reform, cultivating the study of Greek, Latin and Italian, and serving as the President of the Dante Club of New York. Opposition to his views was strong, but he swept aside the unholy alliance of sceptical academics and lawyers that was formed against him. Distinguished practitioners were engaged to lecture on the law, eminent scholars to expound ethics and political philosophy, and he even provided a course of lectures on medical jurisprudence. The latter were delivered by the somewhat eccentric John Ordronaux, who, flayed by a neurotic fear of

contracting disease, disinfected his dollar bills with camphor and his coins with a section of tarred rope, invented a healing elixir which he christened "psychological lemonade," and even slept with his head in a bandbox to outwit the bats whom he suspected were trying to entangle themselves in his hair. Undeterred by criticism the infant law school proceeded serenely on its way, surviving unscathed the civil war which broke out in 1860. By 1872, thanks to Dwight, the original complement of thirty-five students had grown to three hundred and seventy-one, and the school had earned the praise of Dicey, who urged the foundation of a similar institution in England, and James Bryce, who recommended English law students to travel to New York to complete their studies.

By this time the school had become dangerously dependent on the survival of Dwight and to remedy this a further reorganisation took place in 1878, when a full law faculty was set up. Dwight's interests had contracted with the passing of time, and John Burgess, who had been his assistant, resigned in 1880 as a protest against the growing professionalism of the school. He seriously weakened the school by persuading the trustees to set up a separate "School of Political Science" designed specifically to train young men for public life. In 1891 Dwight finally retired and died the following year, appropriately enough when he was making his will. His successor, William Keener of Harvard, introduced the case book system to which he had been converted by the work of Langdell and Ames, but its strictness was modified by combining a study of texts from standard works with that of actual cases. Opposition to the new method was widespread, but gradually died away, Keener stressing that the purpose of the case book method was not to impart professional knowledge but to accustom the student to legal reasoning and to teach him to think in a legal way. Keener's deanship was also memorable for the founding of the *Columbia Law Review*, which soon rivalled the Harvard and Yale journals in prestige and circulation. English lawyers can only marvel that these distinguished periodicals are managed and directed by ever-changing generations of law students.

In 1910 Harlan Fiske Stone became Dean of the school and until 1923 strove to reconcile the conflicting demands of legal researchers, liberal educators and professional practitioners. He was uncompromising in his view that the primary purpose of a law school was "to train men for the Bar in the best possible manner in the limited time at its command." A lawyer's training was however divided into two parts, first the mastery of the principles of common law and equity at the law school, and then the acquisition of a knowledge of procedure and practical experience in a law office. This latter part of the training was in no sense a part of a law school's work. He required his teachers to be men of the widest interests with a knowledge of philosophy, history, and above all sociology. Precedent was to be studied scientifically, but this was not enough. "Precedents," he declared, "cannot be valued justly or intelligently applied without some adequate understanding of those social and economic conditions out of which they spring and of those to which in our own time they must be applied." Law, in his view, was a form of social control intimately related to economics and the social sciences. In particular every law school had a duty to direct its research in the interest of achieving law reforms. Stone thus stressed the primarily theoretical nature of law school instruction, but never forgot that its purpose was practical, encouraging his teachers to keep up private practice and making such experience a condition of appointment. A typical example of his work is the Legislative Drafting Research Department, designed to improve the drafting of statutes and whose work has become one of the school's outstanding contributions to law reform.

Stone retired in 1923 and with his moderating hand withdrawn internal tensions and rivalries increased. The demand that the law school should abandon its traditional purpose of preparing students for practice and become instead a "community of scholars" devoted "to the non-professional study of law, in order that the function of law may be comprehended, its

results evaluated, and its development kept more nearly in step with the complex developments of modern life," became ever more insistent. The struggle between the "research" and "professional" parties continued throughout the deanship of Huger Jervey (1924–1928), and was only brought to an end with the appointment of his successor, Young B. Smith, who was known to be in favour of the school's continuing both its research and professional activities. A major secession of the "researchers" took place, but their appointments were filled by other men and the school survived. Smith remained Dean until 1952 and by a policy of tactful moderation healed the wounds which might have proved fatal. His most cherished project was the foundation of a great law centre at Columbia which would co-ordinate and integrate the knowledge about human behaviour amassed by specialists in every sphere of social study. The Depression and then the Second World War held up this scheme, but in 1949 the trustees approved his development plan for a new building on Morningside Heights of sufficient size to house not only the Law School, but also those of Public Law and Government, International Affairs, and Foreign and Comparative Law. By a lucky chance a magnificent bequest of over a million dollars has provided the means for a dream to be translated into reality. Under the present Dean, William C. Warren, the Columbia Law School can thus be confidently expected to increase still further the renown which it already enjoys throughout the world.

Norman St. John-Stevas.

The Marshall Reader: The Life and Contributions of Chief Justice John Marshall. Bicentenary edition. Selected and edited by Erwin C. Surrency, Associate Professor of Law, Temple University. Docket series, Vol. 3. [New York City: Oceana Publications. 1955. vi and 248 and (index) 2 pp. Paper bound 8s., cloth bound 25s. net.]

This volume is one of a useful series and is most illuminating for the English lawyer, who often knows less about this great Virginian judge and constitutionalist than of many later American judges. The book is divided into five parts, the first being biographical and including Marshall's own autobiographical letter written to his friend Joseph Story, who had requested it for use in preparing a biography of the Chief Justice. The bulk of the book contains essays by various contributors, six dealing with the part played by Marshall in the development of the constitutional law of the United States; and even his obituary finds a place. Apart from his autobiographical letter and a few pages devoted to a selection from his other letters to Story, only thirteen pages contain extracts from Marshall's actual decisions. It is stated in the preface (p. 5) that he was not a prolific author, and that his writings, apart from a few letters, were opinions and official documents completed in various official capacities, but the appendix (a chronology of his Supreme Court decisions, which span the years from 1801 to 1835) suggests that a little more space might, with advantage, have been given to the authentic utterances of the master. As it is, many extracts are of only two or three lines, and although most are apt some might have been lengthened. For example, the extract from the famous case of *McCulloch* v. *Maryland*, 4 Wheaton 316 (1819), given on p. 242, reads: "The question is, in truth, a question of supremacy. . . ." The appetite is only whetted! This is actually only one of fifteen extracts from the same case appearing in these thirteen pages, and many readers might have preferred one long quotation. Again, it may be regretted that the footnotes to the essays appear all together at the end of each contribution, but on the whole the editor is to be congratulated on producing a most worthwhile book at a reasonable price. The reviewer has certainly enjoyed reading it.

D. C. M. Yardley.

ANTI-TRUST LAWS: A COMPARATIVE SYMPOSIUM. Edited by W. FRIEDMANN. University of Toronto Faculty of Law Comparative Law Series, Vol. 3. [London: Stevens & Sons, Ltd. 1956. 635 pp. (including preface, appendices, and index). £4 net.]

THE third in the admirable series of comparative studies produced under the editorial aegis of Professor Friedmann makes pretty tough reading. This is due to the difficulties and complexities of the subject-matter. By "anti-trust laws" are meant the rules relating to what can best be described, in the light of recent English legislation, as "restrictive trade practices." This is no easily described or understood branch of law. But it is modern and important. In view of its importance and the comparatively elementary and limited nature of such law in England, even after the Restrictive Trade Practices Act, 1956, it is extremely valuable for English lawyers to be able to read something succinct about the problems of such law and the way those problems have been faced and dealt with by other legal systems. Hence the timeliness and utility of this volume.

The first part of the book deals with various national laws. Canada (one of the earliest countries to enact such legislation—the French laws of 1791 and 1810 were very limited in nature and scope), France, Germany, Japan, the Netherlands, Norway, South Africa (only an Act of 1955 is given without any commentary or explanation), and Sweden are the countries chosen for discussion, as well as the United Kingdom and naturally the United States. The treatment of the latter nation's law is well annotated and as one might expect very provocative of thought and interest. In this part of the book the emphasis is upon straightforward analysis of the historical development and present day scope of the legislation of each country, and its resultant judicial interpretation and administration. As a course of information for lawyers, politicians, economists and other interested parties this section of the book is of the greatest value. For the English lawyer one of the most interesting points brought out by the study of this part of the book is the way in which in the United States anti-trust legislation has perhaps not been as far-reaching or effective as untutored opinion on this side of the Atlantic may often believe. Thus, apart from the legislative exceptions to the anti-trust laws, in modern times, Mr. Timberg says in the course of his discussion of *U.S.* v. *Aluminium Co. of America* (1945) "the superficially Procrustean thrust of a Sherman Act legal proceeding unleashes even bigger corporate monsters—but more of them!" Another point of interest is how the common law (in contrast with developments in other countries) refused to control the growth of monopolies. As Mr. Grunfeld says, near the end of his valuable exposition of the most relevant common law rules, ". . . in practice, the net result of the law of civil conspiracy as of the doctrine of restraint of trade is one of acquiescence in a wide range of commercial practices which reduce the degree of competition in industry and trade." The recent intervention of Parliament and the workings of the Monopolies Commission—prior to the 1956 Act, which was enacted after the publication of this book, although the original Bill is mentioned in the text and printed in one of the Appendices—are not described by a lawyer but by an economist, Mr. B. S. Yamey. This combination of legal and economic analysis is an important and valuable feature of the book: it occurs not only in the section on the United Kingdom but also in the one on Canada. Moreover, some of the sections are written by authors who combine legal and economic qualifications or have associations with both fields of study and activity, *e.g.*, the sections on France and the Netherlands.

The second part of the book consists of a forty-page chapter on International Cartels and Combines written by Professor Friedmann himself and Mr. van Themaat of the Netherlands Ministry of Economic Affairs. In this section are discussed the problems of anti-trust law in relation to private and public international law (discussed also by Professor Friedmann in his comparative analysis). One of the problems mentioned herein, possibly of the

greatest interest to English lawyers, in view of the recent case of *British Nylon Spinners, Ltd.* v. *Imperial Chemical Industries, Ltd.* (a curious reference to which is given on p. 463, note 9, corrected on p. 494, note 12), is the effect of American anti-trust legislation on foreign and international cartels. On this point there seem to have been several changes of attitude on the part of American courts between the cases of *American Banana Co.* v. *The United Fruit Co.* in 1909 and *United States* v. *General Electric Co.* in 1953. Doubtless the changed position of the United States in relation to the economic life of other countries has affected and will still further affect American legal thinking on this topic.

The third and final part of the book is a comparative analysis written by Professor Friedmann. This is the *raison d'être* of the volume: all the earlier chapters are factual groundwork upon the basis of which this analysis can be written and understood. It is a valuable, if solid piece of work which raises many interesting questions not lightly to be determined nor easily to be debated in a review such as this. One of the interesting parts of the discussion appertains to the differences between judicial and administrative machinery for the enforcement of anti-trust legislation: and in connection with that the differences between the view that any restriction of free competition must be presumed to be undue or against the public interest (the "purist" view adopted in Canada and the United States—though the courts of the latter country have changed their minds about this from time to time), and the view that only *unreasonable* restraints are bad. This latter view is more appropriate for a non-judicial treatment of the problems, one that is administrative in form and machinery, and it is therefore interesting that it is the approach of the new *administrative* tribunal in this country. Professor Friedmann (who would seem to prefer this approach) concludes that in practice the difference between these two views is not so great, since the tests applied by the "purist" courts and those applied by the "rule of reason" countries, coupled with the selectivity of prosecutions in the U.S.A., provide similar results.

Another important discussion is on the effects of having criminal, civil and administrative remedies for breaches of anti-trust laws. The differences between European and North American systems are very marked in this respect (though recent German developments show a leaning towards the creation of criminal offences where other European nations have none). Registration of restrictive agreements is another important topic, the development of which is discussed in this part, while a further problem mentioned by Professor Friedmann relates to exemptions from anti-trust laws on the part of labour organisations and public enterprises.

There are occasional mistakes in the annotations, but the book is well set out and, from the formal point of view, easy to follow. But from what has been said above it will be obvious that this is not a book for casual reading by someone curious about anti-trust law in general. On the contrary, it is a book for those who are keenly interested in the way the law can be shaped to cope with what economists have often described as one of the problems, if not dangers of modern industrial and financial developments. For such readers this work is essential.

G. H. L. FRIDMAN.

UNITED STATES *v.* UNITED SHOE MACHINERY CORPORATION. An Economic Analysis of an Anti-Trust Case. By CARL KAYSEN. [Harvard University Press; London: Cumberlege. 1956. xii and 404 pp. £2 12s. net.]

THE publication of this book at a time when the United Kingdom is at last taking seriously the problems of monopoly and restrictive practices is a happy stroke of fortune. It is the product of a unique experience. At the end of

1947 a civil anti-trust suit of unusual complexity was filed in the District Court of Massachusetts and was allotted to Judge Charles E. Wyzanski Jnr., probably the most brilliant and erudite of the younger generation of American judges. Judge Wyzanski normally selects as his law clerks (that invaluable institution unknown—alas—in this country) a recent graduate of the Harvard Law School, but faced with the economic problems involved in this monster litigation he selected instead Carl Kaysen, a young economist who is now Associate Professor at Harvard. Kaysen served with him for two years and his major work project was an analysis of the economic issues raised by the case. The greater part of this book is the lengthy memorandum which he prepared for the court. To that memorandum has been added an account of the history of the defendants, the United Shoe Machinery Corporation as reflected in previous anti-trust suits in which it had been involved (Chap. 1), a discussion of the final decree of the court which was handed down in February, 1953, and affirmed by the U.S. Supreme Court in May, 1954—nearly seven years after the action had commenced—(Chap. 9), and some final reflections on the economic standards of the anti-trust law and the problems of its enforcement (Chap. 10).

Judge Wyzanski's experiment, which was obviously pleasurable and profitable to both the lawyer and the economist, produced a result not wholly dissimilar from the mixed legal and lay tribunal envisaged under our new Restrictive Trade Practices Act. There are differences of course. Kaysen had no *locus standi* as a member of the bench, as have the lay members of the Restrictive Practices Court, and the issues in the case were somewhat different from and wider than those which will face that tribunal. Moreover, it is to be feared that it will be many years before we can hope to produce a court with the expertise in this field represented by the team of Wyzanski and Kaysen. But a study of this book should give those of our lawyers who will now have to wrestle with analogous problems some conception of the economic issues and concepts with which they will be faced, and some idea of the sort of arguments which they should raise or attempt to meet. It should also give them further food for thought on the question whether a judicial body is the appropriate forum in which to try these issues.

It would be beyond the competence of the present reviewer to expound, let alone to criticise, Kaysen's handling of the two major economic concepts—market power and market performance—in the light of which he analyses in detail United's position in the trade. It would probably be equally beyond the competence of most of the readers of this Review—and this, of course, illustrates the weakness of the English lawyer when he tries to (as he will soon have to) find his way through this unfamiliar labyrinth. What is particularly interesting, and somewhat disquieting, is that Kaysen is highly critical of the American lawyers' handling of these issues, and this despite their experience of nearly seventy years since the Sherman Act was passed. He considers that the strategy of both sides, and especially the Government (though they won), was seriously defective and that the economic material was badly handled. If this is so in the States, where they have long been familiar with the "Brandeis brief," what is the position likely to be here where such arguments are wholly unfamiliar? He remains quite unconvinced that the adversary court procedure is suitable for the trial of such issues and cogently summarises the difficulty faced by a judge trained in the common law tradition when he seeks to frame an effective decree. His observations on these points will not necessarily apply to our Restrictive Practices Court, since the Act has sought to lay down clearly defined and narrower standards of validity which will be justiciable. Whether it has succeeded, time will show. In the meantime a perusal of this fascinating book (and the devotion of serious thought to the final chapter) by all those of the bench, bar, and solicitors who look to this new branch of practice to establish their fame and fortune, should make them perhaps wiser and certainly better informed.

L. C. B. G.

British Colonial Judges. A study by the Inns of Court Conservative and Unionist Society. [London: Sweet & Maxwell, Ltd. 1956. 24 pp. 2s. net.]

The decision in *Terrell* v. *Secretary of State for the Colonies* [1953] 2 Q.B. 482 drew attention to the rule that in the colonies even superior judges are (with a few exceptions) dismissible at the pleasure of the Crown. In a note published at pp. 502–506 of Volume 16 of this *Review* it was suggested that the law be amended to provide that, subject in appropriate cases to the fixing of a compulsory retiring age, superior judges in the dependent territories of the Commonwealth should be removable only for misbehaviour or incapacity, that every judge so removed should have a right of appeal to the Judicial Committee of the Privy Council and that, in specified territories that have reached an advanced stage of responsible government, the initiative in securing removal should be confined to the local legislature. The Inns of Court Conservative and Unionist Society have repeated these suggestions for reform and have added others of their own. They propose the creation by Act of Parliament of a distinct Oversea Judicial Service, with safeguards against reduction of salary upon transfer or abolition of office, and with legal rights to pensions. They also propose that no colonial judge should be removed except after a hearing by, and upon the recommendation of, a Judicial Commission. These proposals appear unexceptionable, and they are resisted only by the argument that things work well enough as they are. In favour of the present situation one can say that in practice a colonial judge would be removed only in highly exceptional circumstances—a fact brought out by the recent controversy over the position in the Seychelles; that colonial judges probably do not feel themselves to be any the less independent of the Executive because of the absence of legal safeguards for their security of tenure; and that certain provisions already exist, either by statute or by virtue of Colonial Regulations (which are admittedly unenforceable in law), for a reference to the Privy Council and (in cases of misconduct) a hearing by a Judicial Commission. But this amounts to nothing more than a demonstration that the present state of affairs is fairly satisfactory; it does not adequately answer the case for proceeding further along the lines suggested.

One aspect of administrative practice criticised by the authors seems indefensible. Colonial Governors are required to make regular routine reports on the judges of the courts in their territory. Presumably the formal explanation of the practice is that the Governor is the representative both of Her Majesty and of Her Majesty's Government; the judges are hierarchically subordinate to him, and he has, indeed, certain disciplinary powers over them; the judges are therefore not entitled to be treated differently in this matter from any other senior members of Her Majesty's Oversea Service. But in substance the judges occupy a unique position in the Oversea Service. To Colonial Governors, who are perfectly well aware of this fact, the task of making these periodical reports must be somewhat embarrassing. To the judges themselves the knowledge that such reports are made may be a greater embarrassment in cases where judicial censure of the conduct of the Executive is appropriate. Let the chief justice report on the puisne judges. The chief justice himself should be able to get along without regular gubernatorial surveillance, and his professional ability will doubtless become known through other channels.

S. A. de Smith.

The Law of State Succession. By D. P. O'Connell. [Cambridge University Press. 1956. xl and 425 pp. 45s. net.]

The publication of a further work in the series of Cambridge Studies in International and Comparative Law, under the general editorship of Judge

Lauterpacht and Lord McNair is in itself an event of note: a comprehensive study in the neglected field of State succession is destined to be of the first importance.

It was in 1907 that Professor Keith published *The Theory of State Succession*, and his work has remained undislodged for half a century. Dr. O'Connell's comments on the book are unambiguous. "Professor Keith," he writes, "indulged in wide generalisations which permitted him to reject contrary opinion and evidence in what can only be described as a cavalier fashion. The one jurisprudential formula Keith appears to admit is *res inter alios acta*, and he chose this because it gave a measure of juristic self-respect to his negative conclusions" (pp. 270–271). In addition, other authors do not escape whipping. Thus we find: "The opinions of writers . . . have been given unmerited prominence in many of the monographs on State succession, although they are of limited relevance and in some instances are positively misleading" (p. 269).

Having thus cleared the air, the author turns to the central problem that faced him when considering a work of this nature: that of assessing the value to be placed upon the writings of previous authors, upon actual State practice, upon court decisions and upon legal opinions, and finally upon the purpose to be achieved by tabulating all of these. Here, as throughout this work, the comments made have the ring of common sense. "No writer's opinion is a greater value than the facts on which he bases it" (p. 270). "A notable portion of State practice consists of the asseverations of interested parties" (p. 272). "Civil law judges are not conspicuous for their knowledge of international law" (p. 272). And finally: "The opinions of the Law Officers are of value second only to that of court decisions, because they are in a measure judicial in character, and largely devoid of political content" (p. 272).

It is perhaps a pity that these words of evaluation should be found in the Conclusion to the book and not in the Introduction as they illumine much of the body of the text. Instead the Introduction is, in part, devoted to a statement and a rejection of the several theories of State succession that have been current in the past. He writes: "Internal as much as external politics have militated against the acceptance by States of an absolute inheritance of obligations. On the other hand, theories of succession which base themselves on the continued identity of the absorbed territory itself are defective in ascribing to the territory after the change of sovereignty the capacity to retain rights and duties" (p. 7). Of what he calls the "negative theory"—that the successor State "seizes what it can and repudiates what it will"—the author writes: "Even if territorial changes are merely replacements of sovereignty it does not follow that positive international law may not attach to them legal consequences, even the consequences of a juridical succession" (p. 9).

After this we are clearly justified in turning to Dr. O'Connell for his own view upon the jurisprudence of State succession, the problems of which, he declares, "invite a strictly jurisprudential analysis" (p. 268). The answer is felt to be of such significance that the liberty is taken of quoting it in full.

"The word 'equity' is the key, it is believed, to the entire problem of State succession. The closest perusal of State practice reveals that paramount in the historical controversies arising out of changes of sovereignty has been an attempt to safeguard the investments of foreign nationals in transferred territory. The starting point in a discussion of State succession is, therefore, not so much the interests of either predecessor or successor States as those of private investors. A man who invests capital and labour in the construction of works of profit and value to a State acquires an equity in that investment that is not destroyed by change of sovereignty. If there were no security of investment, there would be no investment; and a universal refusal to recognise those equities would be destructive of one of the essential economic bases of modern State and international organisation. If international law prescribes an obligation on a State to respect investment of foreign nationals there is no

theoretical objection to assuming a similar obligation on the part of its successor. The obligation does not arise from the express or tacit consent of the State but from the general principle of international law prescribing respect for the equities of foreign investments" (p. 268).

This, as the basis of international obligation, may be regarded either as cynicism or as sociology. But the author goes further. "Rights derived from human nature itself (*sic*) inhere equally in the nationals of all States and demand recognition by all States. Sovereignty cannot render a State irresponsible for its conduct towards the nationals of other States; change of sovereignty cannot deprive those nationals of rights which have accrued under the régime of the old sovereign" (p. 267).

In compiling this work, no effort has been spared to achieve completeness. The body of the text has been based upon State papers, parliamentary reports and the majority of treaties dating back for 150 years, together with a formidable body of opinion of the law officers—seventy-four of which opinions are quoted *in extenso*. These date from 1823 when "Mr. Secretary Canning, etc., etc.," was informed of the legal position "relating to the Exportation of Arms and Ammunition of War to Brazil," down to the year 1901 when the Marquis of Lansdown sought information concerning "the nationality of certain persons who were Burghers of the late Orange Free State."

The body of the book has been divided into four sections. The first deals with the effects upon the international rights and duties of a State that are produced by a change of sovereignty. This section deals with the cases of total and partial succession and contains an interesting survey of the legal problem caused by the Partition of India in 1947, which turned upon whether the partition was a division of the old British India or merely a succession from that India on the part of Pakistan.

The second section is devoted to an analysis of the responsibility of the succeeding State with regard to the legal interests of private individuals. Here are considered the obligations to pay a national debt and to respect rights acquired under a contract made with the predecessor State. In this section some important comments are made upon the doctrine of Act of State which "has been misinterpreted in both literature and judicial pronouncement" (p. 87). The author distinguishes the more modern cases, *e.g., Secretary of State for India* v. *Sardar Rustam Khan* [1941] A.C. 356, which he maintains do not deny "the clearly enunciated opinion in the *Salaman* and *Amodu Tijani* judgments that persons who become British subjects by the annexation or cession of territory do not lose their duly acquired rights. The only point of conflict . . . is on the question of the extent to which machinery for enforcement of these rights exists in English municipal law" (p. 90).

The third section takes us through the practical problems arising in the legal, judicial and administrative structure of a territory following its absorption. Thus the effects of State succession upon actions that are pending is surveyed, in the light *inter alia* of Lithuanian, Syrian, German, Philippine, Danish, Burmese and Indian practice; while we learn on the authority of a decision of a British court in the Transvaal, a district court in Tel-Aviv and a district court in Jerusalem that "judgments of the courts of a predecessor State are not binding as precedents upon the courts of the successor, even where a doctrine of judicial precedent prevails in the law of both countries" (p. 222).

The final section is devoted to the question of the change of nationality. The many authorities presented here upon "one of the most difficult problems of the law of State succession" (p. 215) reveal the wide divergence of practice and the contradiction of theories.

This scholarly work, the product of long research, brings together for the first time the diverse authoritites upon a particularly fascinating and practical subject. It thus fills a void that for long existed, and by its universal sweep fills it to overflowing.

D. G. VALENTINE.

Cases and Materials on International Law. By Lester B. Orfield and Edward D. Re. [London: Stevens & Sons, Ltd. Published under the auspices of The London Institute of World Affairs. 1956. xi and 765 pp. £4 4s. net.]

This, as its title and size suggest, is more than a case book. It is a collection of cases and materials covering the whole of the law of peace and, in Chapter XIII less thoroughly, the law of war; its purpose is "to provide a flexible teaching tool for an introductory course on international law in law schools." There is little doubt that the book will serve that purpose, for the collection of cases, documents, treaties, and excerpts from juristic writings is gathered together under traditional headings and supplemented by editorial notes which give an up-to-date bibliography and indicate related problems.

There is, as the authors rightly point out, no "talismanic solution" to the problem of selection of materials. Yet there are certain omissions which are surprising whatever the criterion of choice adopted. The section on Individuals as subjects of the law of nations gives the U.N. Declaration on Human Rights in full; there is no mention, not even in the Note on this section, of the European Convention on Human Rights, which at least has some normative character and actually functions. At page 233, dealing with Conquest of Territory, the relevant texts of the Covenant and the Draft Declaration on the Rights and Duties of States are given, but no mention is made of the U.N. Charter. At page 253, in the section on the Territorial Sea the first two articles of the 1930 Draft of the Hague Conference are cited, but there is no mention of the more recent draft by the International Law Commission. In the second chapter there is no mention of the question of reservations to treaties and, consequently, no mention of the Advisory Opinion on Reservations to the Genocide Convention. One would have thought that this Opinion would provide excellent material for class discussion. At page 594, in the chapter on Pacific Settlement of Disputes, Article 34 of the Statute of the International Court of Justice is given in abbreviated form . . . in the form in which it was originally contained in the Statute of the Permanent Court. Admittedly the complete statute is given in the Appendix, but the criticism of this abbreviated form has merited alteration in the new statute and certainly merits the inclusion of the full text of Art. 34 in this chapter.

The comments in the Notes are not always as complete or as accurate as one might wish. At page 171 in the chapter on Recognition, mention is made of *Civil Air Transport* v. *Central Air Transport* [1953] A.C., but only as support for the principle that "retroactivity operates only in the area under *de facto* control prior to *de jure* recognition": there is certainly more to be obtained from the judgment than this. At page 377 the *ratio* of *Joyce* v. *D.P.P.* [1946] A.C. is stated thus: "Allegiance to the Crown owed by an American resident in England who applied for and obtained a British passport and renewals thereof was held not terminated by his leaving England and going to Germany." It is suggested that the *ratio* must include a reference to the place where the treasonable acts were committed. Similarly, at p. 403, the judgment of the I.C.J. in the *Corfu Channel* case is given in terms which are inexact: it is there stated that "the International Court of Justice held that British warships had the right of innocent passage through Albanian waters." The fact that the Corfu Channel was an international strait was not merely incidental, but the crux of the decision, and one cannot, on the basis of this decision, simply say that warships have a right of innocent passage through territorial waters.

These criticisms do not, however, detract from the real value of the book. It does provide a most useful collection of source material, and it is to be welcomed as a valuable addition to the tools of the teacher who endeavours to impart to his students a knowledge of international law via the casebook method.

D. W. Bowett.

Laws Concerning the Nationality of Ships. Compiled by the Codification Division of the Office of Legal Affairs of the Secretariat of the United Nations. [New York: United Nations; London: H.M. Stationery Office. 1956. x and 203 pp. 11s. net.]

In 1954 a volume was published in the United Nations Legislative Series on the Laws concerning Nationality, now the Codification Division of the Office of Legal Affairs of the United Nations has placed international and comparative lawyers still further in its debt by publishing a volume of *Laws Concerning the Nationality of Ships* in no less than sixty-six countries.

In the introduction to the volume the Codification Division points out that "each State lays down the conditions on which merchant ships may fly its flag and there is no uniformity in these conditions. However, as has been pointed out (in his Second Report on the Régime of the High Seas prepared by Professor François for the International Law Commission), 'the acknowledged freedom of a State to lay down the conditions on which it shall grant its nationality to ships is, of necessity, based on the concept that the national element with regard to a ship and the manner in which it is used have a wide variety of application, and that a certain minimum should be guaranteed in the general interest of all who use the high seas.'"

It is interesting to note, therefore, that the Dominions, with the exception of the Union of South Africa, make use of the Merchant Shipping Act or, in the case of Canada and New Zealand, of legislation based on the statute of 1894, while both Burma and Ireland use the British legislation. Where other States are concerned, whether they be People's Republics or Latin American Republics, it is difficult to generalise.

In this volume it becomes apparent that both Monaco and the Vatican City possess merchant fleets, while it is easy to understand why the flags of Panama and Liberia are so frequently seen on the highways of the world. By the legislation of 1916 Panamanian ships must be "wholly or partly the property of Panamanian citizens or of foreigners domiciled in the Republic with more than five years of residence therein, or of commercial societies having their headquarters in Panama." In 1925 it was provided that owners could acquire Panamanian nationality for their ships if "they have the vessel enrolled in one of the registries kept in the Inspectorates of the ports of entry of the Republic; they provide themselves with the requisite register; and they navigate under the Panamanian flag." The Liberian law is even simpler: "A sea-going vessel, regardless of tonnage, wherever built, owned by a citizen or national of Liberia or of any foreign country" is eligible for documentation under the laws of the Republic of Liberia. This legislation may explain why neither Liberia nor Panama was invited to the London Conference on the Suez Canal.

L. C. Green.

Private Foreign Investments: Legal and Economic Realities. By Seymour J. Rubin. [Baltimore: The Johns Hopkins Press; London: Cumberlege. 1956. x and 108 pp. 28s. net.]

In 1955 Mr. Rubin, a lawyer practising in Washington who at times served in various U.S. Government Departments, gave some lectures under the auspices of the School of Advanced International Studies of the Johns Hopkins University. They have now been published in this little book and were, as the author tells us, "intended to be illustrative and provocative, not inclusive or definitive." The latter part of this description is certainly accurate. There are four lectures entitled International Law and National Policy; Nature and

Effect of a Taking; Private Property and Public Purpose: Enemy Private Property; Technique of Protection. The most useful lectures are the second and third. In the former the author points out that there exists a serious problem of definition which is aggravated by the modern technique of "creeping expropriations." In the latter the author draws attention to some of the hollowness of the agitation for the return of private enemy property—a point which, when made by the author of the article which appeared in *Department of State Bulletin* 17 (1947) 155, will not cause surprise. On the whole, however, this is a work which, while it makes some interesting points, is not intended to qualify as a substantial contribution to knowledge or to the development of law.

F. A. Mann.

Crime and Social Action. By George Godwin. [London: Watts & Co. 1956. vi and 277 pp. (including index). 18s. net.]

Birdman of Alcatraz. By Thomas E. Gaddis. [London: Victor Gollancz, Ltd. 1956. 254 pp. 16s. net.]

Mr. Godwin has attempted a general survey of the main contributions made to criminology since the time of Beccaria. His work, though not altogether unscientific, is popular in character and may be recommended to the general reader who wishes to obtain a reasonably full view of the subject without going into too much detail. The title chosen is a little misleading—all punishment is social action, but beyond that social action has no special relevance to this book.

The method of exposition adopted is a description in successive chapters of the work of leading criminologists. But the strictly chronological method is not pursued, a somewhat arbitrary division being adopted under which an attempt is made in Part I to analyse the main characteristics of the criminal, in Part II to discuss the problem of his reformation, in Part III to deal with the problem of "murder and madness," and in Part IV to describe some of the more important aspects of crime detection. The work of Lombroso, Goring, Lange, Berg, Schlapp and Wertham is dealt with in Part I; that of Beccaria, Bentham, Romilly, Howard, Elizabeth Fry, Osborne and East and Hubert in Part II; in Part III we are given an exposition of the M'Naghten rules which are discussed in relation to some of the typical murder cases of the present century; while in Part IV the methods of identification by physical measurements, by finger printing, and otherwise, invented by Bertillon, Galton and Hershel are described and a rather slight account of modern forensic science is given.

There are very obvious gaps in the book. Thus to represent modern American criminology by the work of two psychiatrists, Schlapp and Wertham, and those hardly the most important, is somewhat misleading. Indeed modern sociological criminology both in this country, America, and on the Continent is almost completely ignored, which is really inexcusable when one remembers the title of the book. The reader will find that Mr. Godwin is unfamiliar with a great deal of the most modern work in criminology and that his treatment is therefore very patchy.

Many readers also may be rather put out by the bright journalistic style adopted, fortunately more typical of popular science in the U.S.A. than in this country. Thus most chapters begin somewhat in the following manner:—"Lombroso: Criminal Man. Hypothesis: That the criminal is born not made. We are in the Forensic Laboratory of the University of Turin. On the Director's table lie three photographs of a skull, etc., etc." On the other hand Mr. Godwin has gone to a great deal of trouble to study the works of his

authorities at first hand. Thus much of what he has to say as to the actual circumstances of the M'Naghten Case will be new to the majority of legal readers who will generally have been satisfied with what they have found in the textbooks on criminal law. Moreover Mr. Godwin has a lively and interesting style, so that his volume will appeal to many who might not get far with the numerous much more learned works which are now available.

The interest of *Birdman of Alcatraz* lies largely in the astonishing personality of its hero, the double murderer Robert Stroud. The book has, of course, been a best seller and deservedly so, because even American journalism cannot detract from the poignancy of Stroud's life nor sully the astonishing courage with which he has faced his forty-five years of prison life, a courage which cannot but evoke the admiration of the most hard-bitten reader.

The book is thrilling too, with its dramatic description of convict risings in two of the principal American penitentiaries and for its account of Stroud's three trials for his life in connection with his second murder in which the prosecution went all out for a conviction in a way which is repellent to an English criminal lawyer, only to be defeated by the wonderful love, tenacity and courage of the prisoner's mother who at the last moment, and after bearing the burden of organising the defence in the three trials, extracted a reprieve from the dying President Wilson.

Again the human interest of the book is compelling, even if it descends frequently into a gross sentimentality. Consider Stroud's astonishing marriage according to the common law of Kansas State, carried out in his cell, unknown to the prison authorities, by means of a written contract entered into with a prison visitor who had been assisting him with the sale of the canaries which he bred in his cell. This coup, intended to rouse public sympathy and so prevent his transfer to Alcatraz, had been made possible by his intensive study of the legal volumes in the prison library, a knowledge which he was afterwards to make use of in his repeated attempts to go above the heads of the Federal Prison Bureau to the Federal Courts, attempts which, alas for him, met with uniform failure.

But the book also has real criminological value. Stroud's case is quite classical. He was the son of strong-willed parents who were already at enmity when he was born. The boy quarrelled with his father from the start, and was over protected by his mother: assessed under the Glueck prediction tables he would certainly have qualified for a criminal career. Temperamentally an aggressive, self-centred man, only a firm and understanding education would have saved him. In which case his qualities of tenacity, intelligence, and enormous capacity for detailed work might well have brought him to the forefront of the business world where again he might well have got into trouble for a lack of respect for other people's rights.

His murders were not those of a vicious or depraved man. Indeed, there can be little doubt that at the time of the second of them he was not mentally responsible, though no doubt he was not within the M'Naghten Rules. It was about this time that, owing to the help of a prison visitor, he was able to start earning a little money by painting, and it seems fairly clear that it was this which saved his reason. A little later the accident of his acquiring some fledgling sparrows, blown down into the exercise yard during a storm, turned him to what was to be his absorbing occupation for twenty years, the study of birds. In the course of this, he became one of the world's leading experts on the diseases of cage birds, particularly canaries. As from this time he seems to have been a model prisoner, and his career provides a lesson in the value of getting prisoners interested in some form of work, particularly if it is one which gives full mental absorption.

It is with a feeling of shame for humanity and of detestation for the U.S. Federal Prison Bureau that one has to state that Stroud who, according to this book, has behaved well since his second murder in 1916 is still in confinement. It is a scandalous tragedy that the really terrific effort of self-discipline which this violent-tempered man has made to control himself should have been

so miserably rewarded: according to the normal practice he should, in 1937, have been entitled to release on parole but this was denied him. At the time of his reprieve by President Wilson the warden of Leavenworth Prison said that he would live to rue the day, and there can be little doubt that the authorities have been determined to make Stroud an example to all other convicts of what comes to a convict who kills a guard. How vindictively the authorities at Washington have persecuted this unfortunate man is shown by the way they removed his birds and closed down the self-built laboratory in which he conducted his experiments. Vindictiveness coupled with petty-mindedness—for as long as Stroud was able to enlist public interest and support, the penal authorities dared not proceed beyond a policy of pinpricks. As soon, however, as public attention was distracted by the war, Stroud was removed to the island prison of Alcatraz, and all his ornithological activity was brought to an end. He thereupon undauntedly embarked upon a study of penology and prison discipline, being determined to produce a work on this which would be of the same quality as his authoritative work on the Diseases of Birds. The authorities frowned upon this and the author's rather macabre effort to smuggle it out of the prison having failed the manuscript was confiscated and what must at least have been a volume of much interest, and at the best a work of high scientific value has been lost, and probably lost permanently, for the evidence suggests that it has been destroyed.

One is tempted to compare the conduct of prison bureaucrats who behave in this way with that of Himmler and his crew, but in fairness one must not forget that Stroud received many kindnesses and much sympathy from many of his prison guards, and that for a number of years at Leavenworth Prison he received facilities for his work which he could hardly have received anywhere but in the U.S.A. This was certainly not entirely due to human decency but there was a strong element present of that redeeming quality and the final wickedness of Alcatraz seems to have been much more due to the sulkiness of the men of Washington than to any deliberate cruelty of the men on the spot.

C.

An Introduction to Evidence. By G. D. Nokes, Professor of Law in the University of London. Second edition. [London: Sweet & Maxwell, Ltd. 1956. xxxvi and 480 pp. 37s. 6d. net.]

The success of Professor Nokes's *Introduction to Evidence* is firmly demonstrated by the appearance of a second edition within four years of the first. In this short time the volume has grown by no less than fifty-five pages or about one eighth of the whole book. Such rapid increase in bulk does not, one must hope, establish a precedent for the future lest, not many years hence, students will feel themselves "entombed" upon their very introduction to this fascinating but somewhat complex subject.

Not that good grounds for the increase in size are wanting or that any of it is unjustified in itself. No fewer than twenty statutes passed since the last edition and relevant, in a major or minor degree, to this branch of the law had to be incorporated, quite apart from the large number of reported decisions which are conscientiously worked into the text or noted. One of the great advantages of Professor Nokes's book is the fact that he is almost alone in giving full references to discussions and criticism of cases in current periodical literature and thus avoids the need of entering himself into elaborate discussion of points of detail. Since, however, even such major decisions of the highest court as *Harris* v. *D.P.P.* would unfortunately appear to leave

open, if not actually to raise, more questions than they settle, Professor Nokes will be hard put to it to keep his *Introduction* within reasonable bounds. It is to be hoped that he will try.

H. A. Hammelmann.

Hanson's Death Duties. By Henry E. Smith, ll.b.(Lond.), Assistant Controller of Death Duties. Tenth edition. [London: Sweet & Maxwell, Ltd. 1956. lxxvi and 1214 pp. £6 6s. net.]

In the past *Hanson* was the one book on death duty which was indispensable to the specialist. It differed from the other books on the subject in that it was not arranged in narrative form, but consisted of the text of the relevant statutes, with an exhaustive commentary dealing with the whole of the complex case law which had grown up. It was the accuracy and the comprehensiveness of this commentary which made the book invaluable for any closely reasoned work involving questions of death duty. On the other hand, it was a book which the average practitioner, who had to deal with death duty only occasionally, felt he could do without: a more modest book with fewer pages was all he wanted.

One is ready to be critical of any new edition of *Hanson*, simply because of the high standard set by past editions. On the whole, the present edition lives up to that high standard. The editor has been at some pains to produce a book which incorporates the enormous amount of new statutes and case law produced by the ten years since the last edition, in a manner worthy of the book's reputation. That his success has not been entirely complete is undoubtedly due to the size of the task and not to any lack of ability or zeal. One gets the impression from time to time that the editor has, in his anxiety to render clear some statute of more than average complexity, paid insufficient attention to the details of the language used in a statute. An example of what is meant arises with regard to section 44 (1A) of the Finance Act, 1940, as amended by section 46 of the Finance Act, 1950. This provides that annuities of a particular type, given in exchange for free assets, are deemed not to be consideration in money's worth for those assets. The commentary does not make it clear what types of annuity are, or may be, outside the scope of this provision. The point may have great importance in a rearrangement of assets. A more serious omission arises in respect of section 28 (2) of the Finance Act, 1949, the principal enactment with regard to estate duty on property abroad. The commentary here is quite inadequate. It uses phrases like "proper law regulating the devolution" and "British Settlement" as if these expressions represent simple legal concepts requiring little explanation. The decisions in *Iveagh* v. *I.R.C.* [1954] Ch. 364 and *Marlborough* v. *Att.-Gen.* [1945] Ch. 78, although they appear elsewhere in the text, are not discussed in this context, nor is any view expressed as to the liability to estate duty on the death of a life tenant of a settlement made in Great Britain of foreign land. Again, in dealing with the definition of the word "company" in section 31 (1) (*a*) of the Finance Act, 1954, the commentary is misleading. Surely all that is required is to indicate that the same definition appears in section 59 of the Finance Act, 1940; but this is not done.

The criticisms made above are of points of detail. It must be borne in mind, however, that a book of this nature, a commentary on statutory law, should be accurate in its detail. The reader is not primarily concerned with general principles.

As stated above, *Hanson* is traditionally a specialist's book. Today, however, every practitioner is likely to find himself dealing with questions of

estate duty involving large sums of money, in which an appreciation of the detailed provisions of the law is indispensable. The courteous, but exacting, language of the requisitions made by the Estate Duty Office are familiar in many offices where before the war they were unknown. The new edition of *Hanson* is, therefore, likely to appeal to a much wider class of reader than its predecessors. Perhaps with this in view the editor has expanded the introductory chapters, so that they now form an account of the law relating to estate duty in narrative form. This is a great improvement. The practitioner may now use *Hanson* without having to buy a second book which explains the law in narrative form. The narrative is well written, interesting, and free from unnecessary detail. It may be recommended to anyone who wishes to obtain a grounding in the subject, as well as to the practitioner who is already familiar with the main outlines.

Lastly, at the risk of appearing ungracious, it must be pointed out that, since the abolition of legacy and succession duties, there is no real link with Mr. Hanson. The last edition which he edited was the third, published in 1876. Estate duty, the sole remaining death duty, was founded by the Finance Act, 1894. Is there any real justification in using the name of Hanson?

D. C. Potter.

Retirement and Other Annuities Under the Finance Act, 1956. Current Law Guide, No. 12. By H. G. S. Plunkett, of Gray's Inn, Barrister-at-Law of the Oxford Circuit (formerly one of H.M. Inspectors of Taxes) and G. A. Hosking, F.I.A., A.T.I.I., F.S.S., F.I.S. [London: Sweet & Maxwell, Ltd.; Stevens & Sons, Ltd. 1956. viii and 111 pp. 9s. 6d. net.]

The Finance Act, 1956, has removed a substantial injustice from the British system of taxation, in that it permits persons who are "self-employed" or who are in employment that carries no pension, to set aside moneys to provide a pension for old age, and to deduct such moneys from their income brought into charge to tax. This book provides a readable account of the new law, as well as a summary of the existing law relating to superannuation and retirement benefit schemes. It also reprints all the statutory provisions relating to existing and new schemes.

It is not, however, a mere restatement of statutory provisions, for not only are there examples to show the practical application of the rules, but there is also a chapter, clearly based upon experience gained in running existing schemes, on the practical running of schemes under the new Act. The individual may take out a policy with an insurance company, or may take part in a scheme which makes use of a fund invested and accumulated under the terms of a trust deed. Much is made, rightly, of the advantages offered by investment in first-class equities, which is possible where there is a scheme administered under a trust deed.

This guide deserves to be read, not only by lawyers but by all secretaries and treasurers of professional bodies, trade associations and trade unions, who are genuinely interested in the welfare of their members. They will realise that there is far more to the new legislation than a sop to the surtaxed self-employed and a new line of business for the insurance agents.

D. C. Potter.

Nationality and Statelessness in International Law. By P. Weis. [London: Stevens & Sons, Ltd. 1956. xxvii and 338 pp. £3 3s. net.]

For a long time it has been obvious that the public international law of nationality was in need of comprehensive treatment by an expert alive to modern developments and problems. The gap has now largely been filled by this book whose author, as a result of his legal work for the International Refugee Organisation and the United Nations High Commissioner for Refugees, has acquired intimate knowledge of the manifold practical aspects of the subject.

The book is divided into four parts. In the first Dr. Weis discusses the conception of nationality and reaches the conclusion that "the meaning of the term nationality in international law—while usually coinciding with nationality in municipal law—may be both wider and narrower than its meaning as defined by municipal law" (p. 61). The second part, headed "municipal law and international law," is devoted to the broad question whether and to what extent nationality is a matter falling exclusively or essentially within a State's domestic jurisdiction. Where international law imposes definite duties upon a State and these are broken, the delinquent State, as the author points out, is bound to bring its law into line with international law, but, so he adds, "so long as remedial action has not been taken the law remains valid, though unlawful, and the national status of individuals continues to be governed by that law" (p. 91). It is true that Dr. Weis also explains that "international tribunals and other States will not recognise such inadmissible municipal law," but he seems to limit this to cases in which the determination of the national status "is merely incidental to the issue," and reaffirms that "for the determination of national status the municipal law is decisive" (p. 92).

The third part is devoted to the discussion of the actual rules of public international law relating to nationality. Here the author denies, for instance, "the existence of an absolute principle of international law that conferment of nationality must be a voluntary act" (p. 117). Also he suggests that "the right of a State to make rules governing the loss of its nationality is, in principle, not restricted by international law, unless a State has by treaty undertaken specific obligations imposing such restrictions" (p. 129). This part includes, in particular, a discussion of the important subject of the effect of territorial changes as well as other matters of substantive law.

The fourth part containing the author's summary and conclusion is followed by Appendices in which the text of the most important Conventions and Draft Conventions is reproduced.

In his foreword Sir Hersch Lauterpacht describes the book as "the most comprehensive modern treatment of the law of nationality that has appeared so far in the English language" (p. xi). It would be difficult to dissent from this judgment. Yet it may be asked whether the subject could not have received even more comprehensive, more progressive, more convincing treatment. Thus very little of the immense material produced by French decisions seems to have made an impression upon the author's mind; the numerous and highly significant decisions rendered in post-war Germany and involving grave and far-reaching problems of public international law seem to have been ignored with the exception of one case (mentioned at p. 156 without reference to the source) which is not by any means the most important one; academic learning, in so far as it does not specifically relate to nationality, would sometimes have required closer attention. Further, it is perhaps somewhat retrograde to suggest that "nationality may be conferred by operation of law without the consent of the individuals concerned and even against their will in those cases where no State entitled to exercise diplomatic privilege [*sic*] exists, *i.e.*, in the case of stateless persons" (p. 117). This is a view which stems from the author's fundamental thesis as expounded in the second and third parts of his

book and referred to above. It is a thesis which, in connection with the effect of territorial changes, leads the author to the following statement (p. 139):

> It is evident from what has been said earlier that, even if such rules [of international law prescribing collective acquisition and loss of nationality in case of territorial changes] were found to exist, they do not in principle have a direct effect on the nationality of individuals, such nationality being solely determined by municipal law. They only impose a duty on States to confer or withdraw their nationality, failing which they commit a violation of international law.

This is a proposition which, with great respect to the learned author, is open to serious doubt, which in all probability is inconsistent with prevailing practice and doctrine and which, it is believed, has not been proved. There are minor points about which one does not feel altogether happy. *Lowenthal* v. *Attorney-General* [1948] 1 All E.R. 295, mentioned at p. 12, n. 47, required fuller discussion in a different part of the book, *Stoeck* v. *Public Trustee* [1921] 2 Ch. 67, referred to at p. 79, was decided by Russell J. (as he then was). The term "reconduction" used at pp. 52 *et seq.* is not attractive. The statement that "the incorporation ('reunion') of Austria in Germany in 1938, in the view of the present writer, constituted annexation" (p. 141) is not supported by any argument or references and therefore sounds a little bold. The brief discussion of *Kramer* v. *Attorney-General* [1923] A.C. 528 is somewhat disappointing in that, in particular, it fails to make it clear that the case involved, not a problem of double nationality, but a problem of construction.

Such criticism as this reviewer has ventured to express is not in any way intended to belittle the quality of Dr. Weis's work. On the contrary, the preceding observations should be understood as a tribute to the stimulating character of a book which is clearly of considerable value, which is written by a scholar and which deserves to be read and discussed.

F. A. MANN.

THE 1956 INCOME TAX LEGISLATION. By A. S. SILKE, M.COM.(Hons) (Cape Town), C.A.(S.A.). [Cape Town and Johannesburg: Juta & Co., Ltd. 1956. 150 pp. 42s. net.]

THE English lawyer or accountant often wishes to refer to points of revenue law in other States, particularly in other States which are members of the Commonwealth. It can sometimes be very irritating, particularly when the answer is wanted without delay, to have to flounder among books that appear to be out of date, or enormously long-winded. As far as the law of income tax and donation tax in the Union of South Africa is concerned, Mr. Silke's book provides the right answer. It gives the text of the Income Tax Act, 1941, with all subsequent amendments, provides tables to illustrate the rates of tax, and gives notes on the practice of the Tax Commissioners. This is all done in some 150 pages.

A number of points of interest will occur to the English lawyer, without special training in South African law, as he looks through this book. The first is the shortness of the Act. It must be about one third as long as the Income Tax Act, 1952. It can usually be understood by reading the section, unlike the British Act, which is often quite incomprehensible, unless the reader has first studied a commentary. And, not surprisingly, the structure of the tax has a certain similarity to British income tax.

It must, however, be emphasised that the book contains no commentary on the statute, and mentions no decided cases. Thus, although decisions in South

Africa on points of Revenue law may occasionally be of assistance in construing the British statute, this book cannot be used to get onto the right case.

D. C. POTTER.

INCOME TAX LAW AND PRACTICE. By CECIL A. NEWPORT, F.A.C.C.A. and H. G. S. PLUNKETT, Barrister-at-Law (formerly one of H.M. Inspectors of Taxes). Twenty-seventh edition. [London: Sweet & Maxwell, Ltd. 1956. xxxix and 413 and (index) 29 pp. 30s. net.]

THE current edition of this hardy annual (biennial this time) incorporates the provisions of the Finance Acts of 1955 and 1956, the most important, those relating to "Dividend Stripping" and "Retirement Annuities," being concisely dealt with in the last two appendices.

This work was critically reviewed as recently as (1953) 16 M.L.R. 267–268 and again at (1955) 18 M.L.R. 329 and thus requires little further comment save that the deficiencies there observed still remain. In their selection of recent cases, it is strange that the authors, in the paragraph dealing with reserves (144), have completely ignored the important decision of the House of Lords in *Southern Railway of Peru, Ltd.* v. *Owen* [1956] 3 W.L.R. 289. Again, in the paragraphs relating to "Back Duty" (pp. 366 *et seq.*) some reference should surely have been made to *R.* v. *Hudson* [1956] 2 W.L.R. 914, as to the common law offence of "making false statements to the prejudice of the Crown and public revenue with intent to defraud."

Sharkey v. *Wernher* [1956] A.C. 58 might well have been commented upon at para. 168 as well as under "computation of farm profits," for it dealt broadly with the proper treatment of stock on hand withdrawn for the trader's own use.

Twenty-seven editions in a little over a quarter of a century clearly bespeaks the popularity of this work with its own particular public to whom it can again be commended.

A. F.

CHITTY'S QUEEN'S BENCH FORMS. Eighteenth edition. By R. F. BURNAND and D. BOLAND, with a foreword by the RT. HON. LORD GODDARD. [London: Sweet & Maxwell, Ltd. 1956. lx and 1222 and index. £7 9s. 6d. post paid.]

NINE years have passed since the last edition of *Chitty* was published. Since that time the passage of several Acts has necessitated alterations to the text. Among these are the Legal Aid and Advice Act, 1949, the Arbitration Act, 1950, and the County Courts Act, 1955. Further alterations have been caused by amendment of the Rules of the Supreme Court, in particular by the new Order 30 and the additional rules in Order 37. The effects of the new statutes and the amended Rules are apparent not only in the precedents but also in the remarkably full and lucid notes.

Amid much that is exemplary it is disquieting to find one section which might well be revised in future editions. There are set out, from pages 154 to 165, the forms of Statement of Claim as prescribed by Appendix C to the *White Book*. These pleadings cannot commend themselves by their intrinsic merits, for on p. 157, for example, is set out a Statement of Claim in which the plaintiff claims damages for personal injuries caused in a railway accident

by the negligence of a railway company. The negligence is simply alleged to be that of the defendants, with no reference to whoever is alleged to have caused the accident; there are no particulars of negligence, and no particulars of injuries. It is not a valid reply to say that these forms deserve attention because they appear in an appendix to the *White Book,* for the editors of the *White Book,* in their notes to Ord. 19, r. 5, admit that the forms are not perfect. In *The Isis,* Hannen P. ordered a party who had exactly copied one of these forms to deliver a further and better pleading. It is a little difficult to understand why the editors have included these forms and in particular the form cited.

But this criticism, respectfully tendered, is of the contents of only some dozen pages in a book running to over twelve hundred pages. The editors are to be congratulated on having produced an edition which compares favourably with its predecessors. In the words of Lord Goddard, who has contributed the Preface, "The book is indispensable in any law library and the profession is indebted to the authors of the present edition for the labour and accuracy expended upon it."

Allister Lonsdale.

Contracts to Make Wills. By Bertel M. Sparks. [New York: University Press. 1956. 230 pp. $5.00.]

Professor Sparks here throws considerable light on an aspect of the law of succession which, in England at least, has received no great attention. In English law the problems raised by contracts to make wills usually skulk among those attendant upon joint and mutual wills; this survey of the American law, on the other hand, is centred upon them, and mutual wills receive only glancing references.

This study provides also a fascinating example of the vastly different legal growths raised by the English and American judges respectively from a common stock. The American judges, like their English counterparts, evolved their law in respect of contracts to make wills from *Dufour* v. *Pereira*[1] and *Walpole* v. *Orford*,[2] but chose to propagate different aspects of these classic decisions. For example, lawyers from both sides of the Atlantic join in condemning the standard report of *Dufour* v. *Pereira*[3] and prefer Hargrave's more reasonable version, but Professor Sparks does not distinguish the rather peculiar factual background to the case as an English lawyer considering the subject in such detail would probably do.[4] More far-reaching is the failure of American lawyers to stimulate the growth of the idea, adumbrated in *Walpole* v. *Orford,* that the court will be slow to find that a man has contracted to hold virtually all his property on trust, so as to deprive himself of the power to make such future dispositions of it as circumstances may require.[5]

[1] (1769) Dick. 419; 21 E.R. 332, and 2 Hargrave's Juridical Arguments 99. Further light is cast by Lord Loughborough L.C. in *Walpole* v. *Orford* (1797) 3 Vesey Jun. 403, 416; 30 E.R. 1076, 1083.

[2] (1797) 3 Vesey Jun. 403; 30 E.R. 1076. The learned author includes only one subsequent English decision. *Stone* v. *Hoskins* [1905] P. 194 appears somewhat incongruously at p. 121, n. 52.

[3] Dick. 419; 21 E.R. 332.

[4] See *e.g.*, Lord Loughborough L.C. in (1797) 3 Vesey Jun. 403, 418.

[5] In *Walpole* v. *Orford,* Lord Loughborough L.C. said at p. 419: "I do not apprehend any man of honour in the profession would have suffered Lord Orford to execute this agreement without a power of revocation inserted; for it would have been a most absurd deed for him to execute without giving himself a larger latitude to consider what he should do for his own issue female . . . The obligation . . . would have reduced him in

Thus, Professor Sparks can declare that the decision in *Walpole* v. *Orford* "is based solely upon the ground that the contract was uncertain and not sufficiently established by the evidence." [6]

In this branch of the law it is the slight difference of approach between the English [7] and American courts that broadens down from precedent to precedent.[8] The English bench, insisting that wills remain, in effect as well as in theory, revocable until death, has set its face against enforcing contracts to make wills in agreed terms. It requires them to be strictly proved [9]; it refuses damages for breach during the lifetime of a contracting party [10]; it will not grant specific performance.[11] No resulting trust is enforceable by a volunteer unless fully constructed, and the property concerned must be clearly identified.[12] In America, on the other hand, the judges are quick to find such a contract [13]; they grant contractual remedies not only in damages but by way of specific performance,[14] or injunction,[15] apparently even at the instance of third parties [16] and at the expense of creditors.[17] Where the contract, as proved, would deprive the contractor of reasonable use of his property for present or future contingencies, they will even, in effect, make a new contract by exempting from its operation property which a prudent party might have been expected to exclude [18] or which public policy requires should remain disposable, as, for example, to meet the claims of a surviving spouse to dower or distributive share.[19] The author's contention [20] that no claim of a surviving spouse should prevail against that of a contract existing at the

many possible and probable instances of his life to great difficulty and distress. Marriage was in his contemplation. His daughters would have been totally set aside according to the engagement . . ."

Similarly Astbury J. in *Re Oldham* [1925] Ch. 75, 88: "Suppose that the wife had died first, and that the husband not yet sixty had remarried. It is very difficult to suppose that he agreed to a course preventing him making a testamentary provision for his second wife except as to one-twentieth of his residue . . . I cannot help thinking that any reasonable professional man would have advised against the creation of such a trust if brought to his attention . . ." and again: "I think a very great difference between *Dufour* v. *Pereira* and the present case is that in *Dufour* v. *Pereira* the capital of the trust property was secured in fact by the life interest only being given to the survivor, whereas in the present case the survivor is given the whole estate absolutely and could, if so minded, dispose of the whole property *inter vivos*."

[6] Lord Loughborough L.C. declared at p. 420: "I lay it down as a general proposition to which I know no limitation, that all agreements in order to be executed in this court must be certain and defined: secondly, they must be equal and fair; for this court, unless they are fair, will not execute them: and thirdly, they must be proved in such manner as the law requires . . . It is enough for me to say, I doubt upon every one of these points. . . ."

[7] The courts of Australia and Canada follow the English line of decisions: see *Gray* v. *Perpetual Trustee Co., Ltd.* [1928] A.C. 391, affirming a decision of the High Court of Australia, and *Re Fox* 1951 3 D.L.R. (Ontario) 337.

[8] The volume of this in the United States is of course formidable; in his book of 230 pp. Professor Sparks cites some 600 cases.

[9] *Walpole* v. *Orford* (1797) 3 Vesey Jun. 403; *Re Oldham* [1925] Ch. 75.

[10] *Stone* v. *Hoskins* [1905] P. 194.

[11] *Re Parkin, Hill* v. *Schwartz* [1892] 3 Ch. 510. But see *Re Edwards* [1957] 1 Ch. 21, where the conveyance of the property contracted for was held to constitute an election against the (previous) will.

[12] *Walpole* v. *Orford* (1797) 3 Vesey Jun. 403; *Re Oldham* [1925] Ch. 75.

[13] pp. 22–26, 30, 32–33, 191.

[14] pp. 148–149, 154.

[15] pp. 19, 73–78, 155.

[16] See pp. 61, 99, 131.

[17] p. 163.

[18] pp. 64–66, 75.

[19] pp. 157, 171–176.

[20] p. 174.

time of the marriage would, however, blend with the background of English no less than American law, since procedural muddles [21] and the nineteenth-century discovery of a man's right to "do as he likes with his own" have resulted in divorcing the duty of providing for family dependants from public policy, and making it dependent upon the precise wording of a statute.[22]

The learned author is probably right in suggesting [23] that contracts to make wills are generally entered into by laymen, frequently in the face of professional reluctance or active disapproval, and that the background of many such contracts is the desire of the elderly to receive care and affection from friends, relatives and servants in return for an uncertain sum payable upon their death. That such agreements may frequently be oppressive to those rendering the services seems indisputable.[24] This careful study of the American law clarifies, though it cannot answer, the question whether it is preferable for the courts to enforce such rather unsatisfactory agreements (subject to the initial overriding difficulty of proving a firm contract to make payment of an unspecified amount, at death [25]), or whether the English courts have adopted the better course in discouraging them, by letting it be known that only in the rarest cases will such contracts be enforceable, and leaving it to the parties to make more satisfactory arrangements for current payments.

O. M. Stone.

21 See Pollock and Maitland, *History of English Law Before the Time of Edward I*, Vol. 2, Chap. 7, p. 400.

22 In the Inheritance (Family Provision) Act, 1938, as amended in 1952, the court is given a discretion, albeit within very narrow limits, but for example the Intestates' Estates Act, 1952, under which a surviving spouse, whether guilty of a matrimonial offence or not, whether living with the deceased at the time of the death or not, and irrespective of the duration of the marriage, is entitled to the deceased's personal chattels and the first £5,000 of the estate, free of death duties, before the issue of the deceased is entitled to any share, seems contrary to public policy. See, *e.g.*, *Re Park* [1954] P. 89.

23 At pp. 187–190.

24 Nor does the possibility of relinquishing a child for adoption as consideration for such a contract (p. 37) appear very desirable.

25 In England the decision in *Maddison* v. *Alderson* (1883) 8 App.Cas. 467 is a stern warning of the difficulties attendant upon the enforcement of such arrangements.

CORRESPONDENCE

The Editor,
The Modern Law Review.

March 26, 1957.

Sir,

As completely to omit any reference to *res ipsa loquitur* in a discussion of vicarious liability for medical negligence would be a grave fault, I hope the reviewer of the third edition of my book *Law relating to Hospitals* (20 M.L.R. 195) will forgive my pointing out that I did, in fact, refer to that doctrine on p. 142. I willingly concede that the doctrine deserved fuller treatment than I gave it and also mention in the index. His other criticisms, for which I am grateful, will be taken into account in any future revision of the work.

Yours faithfully,
S. R. Speller.

Enfield, Middlesex.